Nos. 17507-17509

United States Court of Appeals
FOR THE NINTH CIRCUIT

MAX KUNEY, JR., and CONSTANCE K. KUNEY, His Wife; MAX J. KUNEY, SR., OLIVE R. KUNEY,

Appellants

v.

WILLIAM E. FRANK, District Director of Internal Revenue,

Appellee

ON APPEALS FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

HONORABLE GEORGE H. BOLDT, *Judge*

BRIEF FOR THE APPELLEE

LOUIS F. OBERDORFER,
Assistant Attorney General.

LEE A. JACKSON,
I. HENRY KUTZ,
DONALD P. HORWITZ,
Attorneys,
Department of Justice,
Washington 25, D. C.

BROCKMAN ADAMS,
United States Attorney.

OFFICE AND POST OFFICE ADDRESS:
1012 UNITED STATES COURTHOUSE
SEATTLE 4, WASHINGTON

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BRIEF FOR THE APPELLEE

OPINIONS BELOW

The instructions to the jury (R. 332-352) and its verdict (R. 77-78) are unofficially reported at 61-1 U.S.T.C., par. 9223. The District Court's oral opinion rendered in granting the Director's motion for judgment notwithstanding the verdict is unofficially reported at 61-2 U.S.T.C., par. 9631. (R. 353-357.) The District Court rendered a memorandum opinion in

denying the Director's motion for summary judgment which is not recorded. (R. 48-49.)

JURISDICTION

These appeals involve federal income taxes for the taxable years 1952, 1953, and 1954. (R. 50.) Taxpayers timely filed with the District Director federal income tax returns indicating income taxes due, which taxes were timely paid but, on or about November 20, 1957, the Commissioner of Internal Revenue mailed to taxpayer his statutory notices of deficiency ("90 Day Letter") determining deficiencies against the taxpayers for the years here involved. On or about February 5, 1958, the taxpayers paid or caused to be paid to the District Director the deficiencies so determined with interest thereon. (R. 51.) Timely claims for refund were filed by taxpayers and were rejected as follows (R. 52):

Name	Date Claim Filed	Date Claim Disallowed	Taxable Year	Amount of Claim
Olive R. Kuney	4/22/58	9/15/58	1952	$14,289.47
Max J. Kuney, Sr.	4/12/58	9/15/58	1952	13,662.39
	4/10/58	9/15/58	1953	4,149.57
	4/12/58	9/15/58	1954	5,011.14
Max J. Kuney, Jr.	4/16/58	9/15/58	1952	35,076.95
Constance K. Kuney	4/16/58	9/15/58	1953	5,085.09
	4/16/58	9/15/58	1954	5,791.67
			Total	83,066.28

Within the time provided in Section 3772 of the Internal Revenue Code of 1939 and Section 6532 of the

Internal Revenue Code of 1954 and on February 4, 1960, the taxpayers brought actions in the District Court for recovery of the taxes paid. (R. 3-29, 53.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1340. After trial before court and jury a verdict was rendered in favor of the taxpayers on November 23, 1960. (R. 77-78.) On November 25, 1960, the Director, having moved for a directed verdict, filed a timely motion for judgment notwithstanding the verdict pursuant to Rule 50 of the Rules of Civil Procedure. (R. 78-85.) On March 22, 1961, the court rendered its decision in favor of the Director on his motion. (R. 353-356.) The judgment in favor of the Director was entered on April 25, 1961. (R. 86-87.) Within sixty days and on May 19, 1961, notices of appeal were filed. (R. 88-90.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTION PRESENTED

Upon the record was the District Court correct in setting aside the verdict — that taxpayers in their trustee capacity were partners in the Kuney family partnership — as without support in the evidence and as positively negatived by the evidence and in directing judgment dismissing the complaints?

STATEMENT

These are suits for refund of income taxes for the calendar years 1952, 1953, and 1954. The Director's motion for summary judgment was denied (R. 48-49) and a pre-trial order was thereafter entered (R. 49-71). After trial to court and a jury the jury rendered a verdict in favor of taxpayers on the following question which was submitted to it (R. 77-78):

> On a consideration of all facts and circumstances shown by the evidence and under the law given you by the Court, do you find the status of Kuney Sr. and Kuney Jr. in their trustee capacity (separate and apart from their personal capacity) as partners in the Kuney family partnership genuine, bona fide and valid for income tax purposes?

Thereafter the court granted the Director's timely motion for judgment notwithstanding the verdict (R. 353-356) and judgment was entered decreeing that taxpayers are not entitled to any recovery and dismissing their complaints with prejudice (R. 86-87).

The following facts are not in dispute:

The taxpayers, Olive R. Kuney and Max J. Kuney, Sr., are and at all times material hereto were residents of Seattle, Washington. Taxpayers Max J. Kuney, Jr., and Constance K. Kuney are husband and wife and at all times material hereto have resided in Spokane, Washington. (R. 50.)

Prior to January 1, 1952, taxpayers Max J. Kuney, Sr., and Max J. Kuney, Jr., were the sole partners in the firm of Max J. Kuney Company, engaged in the contracting business. (R. 146; Exs. 28, 34, Appendix B, *infra.*) The claims for refund raise the questions of who are the partners and who may be taxed for the income of the partnership Max J. Kuney Company for 1952, 1953, and 1954. (R. 53.) The income of the partnership for each of the calendar years involved, which was available for distribution among the partners for federal income tax purposes (prior to allowance of partners' salaries), was as follows (R. 54):

	Calendar Year		
Class of Income	1952	1953	1954
Ordinary income	$419,346.59	$85,796.42	$ 55,571.02
Net long term capital gain	31,078.49	13,807.35	63,352.58
Total	$450,425.08	$99,603.77	$118,923.60

The salaries paid by the partnership to the partners Max J. Kuney, Sr., and Max J. Kuney, Jr., for each of the years involved were as follows (R. 54):

Partner	1952	1953	1954
Max J. Kuney, Sr.	$25,000	$10,000	$5,000
Max J. Kuney, Jr.	25,000	10,000	5,000

On or about February 11, 1952, Max J. Kuney, Sr., as grantor and Max J. Kuney, Jr., as trustee,

made and executed a trust agreement (R. 54) which states (R. 370):

> * * * it is the intention of the Grantor to make a gift in trust for the benefit of his minor child, John Richardson Kuney, of a percentage of his interest in each of said partnership businesses; * * *[1]

On or about the same date, Max J. Kuney, Jr., and Constance K. Kuney, as grantors,[2] and Max J. Kuney, Sr., as trustee, made and executed a trust agreement (R. 54) which states (R. 357):

> * * * it is the intention of the Grantors to make a gift in trust for the benefit of their minor children and others of a percentage of their interest in each of said partnership businesses; * * *

In each of these trusts the grantor appointed himself successor trustee, retaining the further right to appoint additional trustees and a successor to himself as trustee. (R. 368, 380.)

The taxpayer-grantors each duly and timely filed federal and state gift tax returns indicating respective gifts of $100,000 and paid the gift tax due thereon.

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[1] The only partnership business substantially involved in this case is that of Max J. Kuney Company, which owned 50% interests in the Kuney Johnson Company, Teclar Aluminum Products and Agutter Electric Company. (Ex. 28, Appendix B, *infra.*)

[2] Constance K. Kuney was a party to the instrument as Max J. Kuney, Jr's. wife; accordingly, Max J. Kuney, Jr., will usually be referred to below as the grantor.

(R. 54-56.) Timely partnership returns were filed (R. 57) as were the taxpayers' personal (R. 51) and fiduciary (R. 57) returns. Income taxes paid as per the fiduciary returns and interest were, however, refunded to the trusts by the Commissioner of Internal Revenue. (R. 58.)

During each of the calendar years involved capital was a material income-producing factor in the partnership of Max J. Kuney Company. (R. 56.)

The primary beneficiaries of the trusts created by Kuney, Jr., were Caroline I. Kuney and Max J. Kuney, III, two and six years old, respectively, and the primary beneficiary of the trust created by Kuney, Sr., was John R. Kuney, seven years old at the time the trusts were created. (R. 100, 108, 265, 273.)

Under the terms of the respective trust instruments, the then trustees could accumulate all or any part of the trust income and could add it to the trust principal until the primary beneficiaries above reached the age of thirty years. (R. 362, 374.) The principal of each trust fund was not required to be paid out during the lives of the primary beneficiaries, but could be held by the trustee until the youngest issue of Caroline, Max and John, respectively, attains the age of twenty-one years, or would, if living, have attained the age of twenty-one years. (R. 360-361, 372-373.)

The trustees had absolute and sole discretion to distribute the principal when each primary beneficiary attained the age of twenty-one years and had sole and absolute discretion to use and apply all or such part of the trust income distributable to beneficiaries under the age of thirty years for or towards the maintenance, education, enjoyment, health and welfare of such persons and while such persons were under the age of twenty-one years, to so use and apply the income himself, or to pay the same, or any part thereof, to such person or to the parent or guardian of such person for the use and benefit of such person, without any responsibility for the application thereof by such guardian or parent. (R. 362, 373-374.) The grantor of each trust was at the time of the creation of the trust the parent of the respective primary beneficiaries. (R. 100, 265.) None of the primary beneficiaries had any control over the disposition of his interest in the trust property at his death; it would pass to his issue, if any survived or, if a beneficiary left no issue to the children of the trustee or their issue, in one case (R. 373), and to the "heirs at law of the last survivor" of grantors' children in the trust created by Kuney, Jr. (R. 361). The trustee of the trust created by Kuney, Jr., also had sole and uncontrolled discretion to pay to the mother, grandfather or grandmother of Kuney, Jr., or to any of them, at any time, such

portion or portions of the trust income as the trustee might deem necessary for the support, health, maintenance, welfare and enjoyment of such persons, due regard being given by the trustee to the other sources of income of such persons. It was also stated that the "Trustee's determination as to whether or not payments shall be made to the persons named in this section and the amount of such payments shall not be subject to judicial review." (R. 359-360.)

During the three years involved, distributions of trust income by the trustees to the respective grantors' children were made only in 1952 and were as follows (R. 56):

	Trust for Benefit of		
Distributee	Caroline I. Kuney	Max J. Kuney, III	John Richardson Kuney
Caroline I. Kuney	$10,000		
Max J. Kuney, II		$10,000	
John Richardson Kuney			$18,788.72

Distributions from the trust created by Kuney, Jr., for his children were made by his father-trustee to his mother and grandparents as follows (R. 56):

Date	Distributee	Amount
1952	Lorraine B. Kuney	$3,600
1952	C. H. and Mabel Bentley	4,800
1953	Lorraine B. Kuney	2,000
1953	C. H. and Mabel Bentley	4,800
1954	C. H. and Mabel Bentley	4,800

The following further facts appear from the record:

Immediately prior to the creation of the trusts, a parnership agreement existed between the taxpayers which contained the following provisions (R. 146):

> The father shall continue as the nominal head of the firm with final decision on all matters pertaining to the firm, but it is contemplated that the father will gradually retire from active management with decreasing duties and responsibilities and that the son will take over increasing duties and responsibilities, but always with the father continuing in full authority with final decision on all matters pertaining to the firm.

When the trusts were set up appropriate entries were made in the partnership books to reduce the capital accounts of the grantors and establish capital accounts for the trusts (R. 122-123) but no change was made in the above partnership agreement (R. 162). On February 11, 1952, effective as of January 1, 1952, each grantor did execute an agreement with his trustee providing that the grantor's share of partnership "income shall be distributed annually between" the grantor and the trust "as provided by the rules of law then effective for family partnerships and in conformity with the provisions of said Trust." (Exs. 24, 25, Appendix B, *infra;* see R. 182-183.) Subsequently, on February 7, 1957, effective as of January 1, 1955,

a further agreement was made between the active partners, Kuney, Sr., and Kuney, Jr., that their respective salaries were to be paid so far as possible from partnership capital gains. (R. 181; Ex. G, Appendix B, *infra.*)

On February 11, 1952, the date of the creation of the two trusts, the understanding was that partnership profits were to be divided on the basis of total capital invested in the business by each partner. (R. 290.) The 1957 agreement referred to in the preceding paragraph made the same provision. (R. 181; Ex. G, Appendix B, *infra.*) An equal division of profits between father and son was the practice of the partnership previous to the creation of the trusts (R. 147-148); despite this, however, the father's and the son's capital accounts, both before and after the creation of the trusts, were not equal and the equal division of profits was "not in accordance with the capital invested at all" (R. 290; Ex. 28; Schedule B, following Br. 6A).

On June 1, 1953, the partnership operations were reorganized; only the fixed assets (land, buildings, machinery and equipment) were retained by the partnership. (Br. 10; R. 171.) That portion of the business formerly carried on by the partnership which consisted of constructing and conduct of actual opera-

tions was withdrawn from the partnership and thereafter carried on by the Max J. Kuney Company, Inc. (R. 124 - 126.) Kuney, Sr., testified that when the corporation was formed the trusts, as well as their grantors (Kuney, Sr., and Kuney, Jr.), were to receive an interest in the corporation (R. 165) through stock to be issued to the family partnership. However, in February, 1957, the corporate stock which had been issued to the family partnership, of which the trusts were nominally part owners, was recalled and cancelled as incorrectly issued and new certificates were instead issued to Kuney, Sr., and Kuney, Jr., individually. (R. 166-167, 168; Ex. R, Appendix B, *infra.*) No dividends were ever paid by the corporation to the partnership. (R. 221.) The effect of the formation of the partnership was to cause its total income to consist entirely of rental and interest payments made by the corporation to the partnership for the use of the partnership's fixed assets. (R. 173, 186-187.) As a matter of fact, the rental rates for the partnership assets used by the corporation during the years 1952, 1953, and 1954 were not actually determined until 1957. (R. 189, 190.)

Partnership assets were pledged as security on bank loans to the corporation even though the trusts owned no stock in the corporation. (R. 208, 295-296.)

The creation of the trusts, the formation of the partnership, the trust provisions pertaining to the distribution of trust income, the allocation of partnership income between the grantors and their trusts, the determination of the amounts of rent and interest to be paid by the corporation to the family partnership, and the gifts of additional partnership capital made to the children were all motivated by the purpose of reducing federal income taxes. (R. 106-110, 116, 143, 161, 241, 250, 251, 300; Exs. 24, 25, Appendix B, *infra.*)

SUMMARY OF ARGUMENT

The fact that the gifts of partnership interests in trust may have been effective under state law does not of itself suffice to make the donee-trusts the true owners of portions of the partnership for federal income tax purposes. It is the command of the taxpayer over the income which is the concern of the tax laws and single earnings cannot be divided into two units by the simple expedient of drawing up papers. The establishment of reciprocal trusts for interfamily gifts by grantors and trustees who are both closely related and the sole partners of the partnership concerned, requires the taxpayers to bear the heavy burden of proving they were *bona fide* partners in a separate and independent capacity as trustees. The record in this

case will not support a jury verdict for the taxpayers because there is no evidence that they no longer maintained dominion and control over the property and its income; indeed, the contrary is affirmatively established. Moreover, there is no evidence whatsoever in the record indicating that taxpayers acted as trustee-partners independently of their own interests, aside from the taxpayers' own self-serving testimony.

The purported gift made no change in the control or management of the partnership. Taxpayers remained the only active partners and they possessed and exercised complete unrestricted power to control the partnership assets and the income being earned by and distributed to the trust. Unquestionably, the creation of the trusts and the allocation of partnership profits were made to avoid federal income taxes. The record lacks evidence that the taxpayers as trustees acted solely in the interests of the trust beneficiaries.

In any case, taxpayers retained so many of the incidents of ownership in their own right that they remained the substantial owners of the income-producing property. To shift the incidence of income tax from the grantors, there must be a complete transfer of the substantial attributes of ownership,

dominion and control, as well as the forms of ownership.

Additionally, in light of the practical circumstances of the trust instruments, their reciprocal character and the close relationship of the parties, the provisions allowing the trustees to distribute the income to the grantors as the parents or guardians of the trust beneficiaries during their minority, should be examined carefully. Since the grantors will have the widest possible discretion in using the income for the benefit of their children and since such discretion is unencumbered by any fiduciary responsibility or supervision, these provisions throw grave doubt upon the genuineness of the trusts and also serve as an additional basis for treating the taxpayer-grantors as owners of the trusts within the meaning of Section 677 of the 1954 Code and Section 167 of the 1939 Code.

Upon the record, the District Court was amply warranted in setting aside the verdict as without support in the evidence and as positively negatived by the evidence and in directing judgment dismissing the complaint.

ARGUMENT

I

INTRODUCTION

As already stated, the question submitted to the jury in this case was (R. 77-78, 340):

> On the consideration of all facts and circumstances shown by the evidence and under the law as given you by the Court, do you find the status of Kuney, Sr., and Kuney, Jr., in their trustee capacity, separate and apart from their personal capacity, as partners in the Kuney family partnership genuine, bona fide, and valid for income tax purposes?

The District Court's instructions on the law consisted of an explanation of how to determine whether or not taxpayers established by a preponderance of the evidence that they were entitled to the claimed refunds (R. 336-339) and a description of the substantive principles of law (R. 340-349) which closely followed the applicable Treasury Regulations (Appendix A, *infra*). The jury answered the above question "Yes". (R. 78.)

In response to the Director's motion to have the verdict set aside (R. 78-85), which question had been properly reserved under Rule 50(b) of the Federal Rules of Civil Procedure (R. 71-76, 77), the District Court set aside the jury verdict as not supported by substantial evidence and granted a judgment for the

Director notwithstanding the verdict. (R. 86-87, 355-356.) The District Judge explained "only generally" (R. 354) that, while there was some evidence not inherently incredible which might support a fact finding favorable to taxpayers on one or more of the factors referred to, the vital element of retention and exercise of control is "positively negatived by the evidence" (R. 355) and "the Court has the clear and firm conviction that the evidence as a whole is not sufficient to sustain plaintiffs' affirmative burden of proof on that basic issue" (R. 356).

The fact that a gift was made in trust and effective under state law does not of itself suffice to make the donee the true owner of the donated capital for federal income tax purposes. *Schallerer* v. *Commissioner*, 203 F. 2d 100 (C.A. 7th). It is the command of the taxpayer over the income which is the concern of the tax laws and single earnings cannot be divided into two tax units by the simple expedient of drawing up papers. *Commissioner* v. *Tower*, 327 U.S. 280, 291. While the decisive question of whether or not a bona fide partnership was intended is factual the Supreme Court has made it clear that, where the services contributed by the donee partner are not "vital" and "he has not participated in 'management and control of the business' or contributed 'original capital'," the taxpayer has a "heavy burden" to prove the above ulti-

mate fact. *Commissioner* v. *Culbertson*, 337 U.S. 733, 744. In *Culbertson*, the Court went on to analyze its decisions in *Tower* and *Lusthaus* v. *Commissioner*, 327 U.S. 293, stating that (pp. 745-746):

> In each case the husband continued to manage and control the business as before, and income from the property given to the wife and invested by her in the partnership continued to be used in the business or expended for family purposes. * * * This, we thought, provided ample grounds for the finding that no true partnership was intended; that the husband was still the true owner of the income.

Thus, where as in the instant case, taxpayers retained and exercised control over both the property purportedly transferred and the income earned therefrom, a jury cannot, as a matter of law, find that a bona fide partnership was intended. The District Director submits that taxpayers' self-serving assertions of good faith and the fact that the trust beneficiaries' share of retained earnings has grown are not enough to support such a verdict. There must be some concrete evidence that the donee-trustee acted independently of the taxpayers or that the taxpayers no longer maintained dominion and control over the property and its income. The family relationship facilitates too easily the shifting of tax incidence by mere surface changes of ownership.

II

TAXPAYERS' SELF-SERVING STATEMENTS THAT THEY CONSIDERED THEMSELVES AS TRUSTEES ARE INSUFFICIENT EVIDENCE OF A BONA FIDE GIFT OF PARTNERSHIP INTERESTS UNDER THIS RECORD

Taxpayers' argument on appeal seems based on the proposition that the grantors, as independent trustees, were acting in the best interests of the trust beneficiaries and, as such, were partners in the partnership and had the same management powers in the partnership as trustee-partners as they had as partners in their own interests. (Br. 17, 18, 20, 21.) It is submitted that there is no evidence whatsoever in the record indicating that taxpayers acted as trustee-partners independently of their own interests aside from taxpayers' own self-serving testimony. Indeed, the record affirmatively establishes that taxpayer-grantors retained in their own right and exercised control over the property purportedly donated to their children.

Taxpayers contend that the evidence shows the grantors, as trustee-partners, exercised their independence in at least one important matter. (Br. 20.) The only evidence in the record to which taxpayers could possibly have reference is the following testimony of Max J. Kuney, Jr. (R. 277-278):

Q. Has there been substantial disagreement between your father and yourself relative to important business matters?

A. Occasionally.

Q. Could you give us an example?

A. Well, the most recent and perhaps the most important was in 1958 when he desired to establish a separate contracting branch in Seattle to do highway work after the dissolution of the other Seattle businesses, and at first I agreed with that idea because we planned it to be completely separate and autonomous, to have its own shop and own equipment, and he took in two outside partners outside our business, outside our family, and formed the company. But then he decided he wanted to run it with equipment from Spokane, that is, family partnership equipment and use it for piecemeal periods and return it, and we would not have maintenance facilities here for it. So I did not approve, and there was quite a considerable argument, believe me, but the ultimate result was that that company was dissolved, the other investors received their money back, and we did not go into the business here.

Nothing in this testimony indicates that Kuney, Jr., exercised his judgment and partnership control as an independent trustee with the best interests of the trust beneficiaries in mind. At best, it indicates that, by 1958, Kuney, Jr., exercised his business judgment independent of that of his father when it came to his making a personal investment in a new business.

Taxpayers contend that the testimony of the wit-

nesses, Henry and Coon, established that "all creditors were made aware of the existence of the trusts as partners in the Kuney family partnership." (Br. 13.) However, Mr. Henry and Mr. Coon testified only for the surety company and the bank, respectively, both of which did business with the Max J. Kuney Company (R. 198-201; 204-207), and the Kuney Company financial statements indicate that the partnership had substantial liabilities in addition to contract bonds and bank loans. (Exs. 30, 31, 32, Appendix B, *infra.*) Each of these statements omitted any reference at all to the trusts when describing the various partners. (Exs. 30, 31, 32, R, Appendix B, *infra.*)

Furthermore, Mr. Henry testified that he knew a Mr. Claggett was a special partner and that he was not surprised that the Dun & Bradstreet report of 1953 listed Claggett as a partner and made no mention of the trusts. (R. 202-203.) Mr. Coon stated Mr. Claggett was not a partner in the family partnership but "in the profits." (R. 212-213.) The financial statement of December 31, 1952, did not list Mr. Claggett at all as affiliated with the company enterprises. (Ex. 30, Appendix B, *infra.*) After the formation of the corporation Kuney, Sr., and Kuney, Jr., and allegedly the trusts, were the sole owners of the Max J. Kuney Company partnership, the partnership instantly in-

volved. (Ex. A, Appendix B, *infra.*) The Dun & Bradstreet report of 1953 did not list Mr. Claggett as a partner in the Max J. Kuney Company; it described him as a "partner" in the Heavy Construction Division of the corporation. (Ex. 31, Appendix B, *infra.*) The certificates of true name or firm name filed for Max J. Kuney Company in 1945 and 1953, respectively, stated that Kuney, Sr., and Kuney, Jr., were the only persons conducting business under the name of Max J. Kuney Company. (Exs. 34, 35, Appendix B, *infra.*)

The testimony of Mr. Henry and Mr. Coon indicated only that they knew of the existence of the trusts. (R. 202, 203, 205, 206, 208.) Since no partnership agreement was ever executed naming the trustees as partners, no financial statements ever stated that any partner was a trustee, and since the certificates of true name, which must be filed by partnerships doing business in Spokane County, stated that Max J. Kuney and Max J. Kuney, Jr., were the only persons conducting or having an interest in the Max J. Kuney Company (Exs. 34, 35, Appendix B, *infra*), it is highly doubtful that the firm's past, present or potential creditors knew that Kuney, Sr., and Kuney, Jr., considered themselves as partner-trustees, bound to act in the interests of their children.

The record is plainly void of any testimony by disinterested witnesses (see *Sellers* v. *Commissioner*, 218 F. 2d 380 (C.A.9th)) or any objective evidence that the taxpayers made or even had power to make partnership decisions as independent trustees. Both taxpayers stated that they each represented two partnership interests, that of their respective trust and that of their own personal estate, and they asserted that they kept these interests separate and independent. The record in its entirety indicates the contrary; this was but a paper arrangement, the real control remained with the taxpayers, unrestricted by any fiduciary obligations. When the evidence, or lack of evidence, as to the independence of the trustees is viewed together with the circumstances and the various controls over the property retained and to some extent exercised, it is clear that the purported intrafamily gifts were intended to have only tax consequences.

III

THE PURPORTED GIFT MADE NO CHANGE IN THE CONTROL OR MANAGEMENT OF THE PARTNERSHIP

Before each taxpayer transferred a portion of his interest in the partnership to the other taxpayer for the benefit of each one's family, taxpayers had a partnership agreement between them which designated the

father as nominal head of the firm with full authority to make final decisions on all matters pertaining to the firm. (R. 146.) Taxpayers never even went through the formality of drawing up a new partnership agreement when, as they claim and the Director denies, two new persons (Kuney, Sr., and Kuney, Jr., as trustees) became active partners in the firm. They merely made entries in the partnership books to change the capital accounts and agreements were executed by each grantor and his respective trustee requiring that partnership income be allocated between the grantor and the trust according to the federal tax law. (R. 122, 160-161; Exs. 24, 25, Appendix B, *infra.*) Clearly, if an independent person or entity were to become a trustee for either of the trusts, he would not become a partner in the family partnership, but would merely own an interest in the partnership. 2 Revised Code of Washington (1951), Section 25.04.270; *Beebe* v. *Allison*, 112 Wash. 145, 192 Pac. 17; Uniform Partnership Act (7 U.L.A., Section 27). Mere book entries are insufficient to change either the partners of the firm or the donor partner's tax obligations. *Hash* v. *Commissioner*, 152 F. 2d 722, 724 (C.A. 4th). Taxpayers have made neither a formal nor a substantive transfer of control and management to themselves as independent trustees, but have merely

reallocated partnership income for federal income tax purposes.

Taxpayers Kuney, Sr., and Kuney, Jr., were the only active partners in the family partnership both before and after the creation of the trusts. Father and son were grantors, trustees and partners in a business owned by themselves and their family. However effective the transfer of taxpayers' interest in the partnership may be under state law, a transfer "which makes no real change in the economic situation of the group or in the control or management of the business" should not be allowed to reduce the federal income tax obligations of the donor. *Kohl* v. *Commissioner*, 170 F. 2d 531, 535 (C.A. 8th); *Economos* v. *Commissioner*, 167 F. 2d 165, 167 (C.A. 4th). Since the income remains in the family and since the taxpayers have retained control over the property, they have substantially complete assurance that the trust will not effect any real change in their economic position. *Helvering* v. *Clifford*, 309 U.S. 331, 335-336.

IV

TAXPAYERS RETAINED COMPLETE UNRESTRICTED POWER TO CONTROL THE INCOME BEING EARNED BY AND DISTRIBUTED TO THE TRUST

The taxpayers retained complete unrestricted power to control the income being earned by and dis-

father as nominal head of the firm with full authority to make final decisions on all matters pertaining to the firm. (R. 146.) Taxpayers never even went through the formality of drawing up a new partnership agreement when, as they claim and the Director denies, two new persons (Kuney, Sr., and Kuney, Jr., as trustees) became active partners in the firm. They merely made entries in the partnership books to change the capital accounts and agreements were executed by each grantor and his respective trustee requiring that partnership income be allocated between the grantor and the trust according to the federal tax law. (R. 122, 160-161; Exs. 24, 25, Appendix B, *infra.*) Clearly, if an independent person or entity were to become a trustee for either of the trusts, he would not become a partner in the family partnership, but would merely own an interest in the partnership. 2 Revised Code of Washington (1951), Section 25.04.270; *Beebe* v. *Allison*, 112 Wash. 145, 192 Pac. 17; Uniform Partnership Act (7 U.L.A., Section 27). Mere book entries are insufficient to change either the partners of the firm or the donor partner's tax obligations. *Hash* v. *Commissioner*, 152 F. 2d 722, 724 (C.A. 4th). Taxpayers have made neither a formal nor a substantive transfer of control and management to themselves as independent trustees, but have merely

reallocated partnership income for federal income tax purposes.

Taxpayers Kuney, Sr., and Kuney, Jr., were the only active partners in the family partnership both before and after the creation of the trusts. Father and son were grantors, trustees and partners in a business owned by themselves and their family. However effective the transfer of taxpayers' interest in the partnership may be under state law, a transfer "which makes no real change in the economic situation of the group or in the control or management of the business" should not be allowed to reduce the federal income tax obligations of the donor. *Kohl* v. *Commissioner*, 170 F. 2d 531, 535 (C.A. 8th); *Economos* v. *Commissioner*, 167 F. 2d 165, 167 (C.A. 4th). Since the income remains in the family and since the taxpayers have retained control over the property, they have substantially complete assurance that the trust will not effect any real change in their economic position. *Helvering* v. *Clifford*, 309 U.S. 331, 335-336.

IV

TAXPAYERS RETAINED COMPLETE UNRESTRICTED POWER TO CONTROL THE INCOME BEING EARNED BY AND DISTRIBUTED TO THE TRUST

The taxpayers retained complete unrestricted power to control the income being earned by and dis-

tributed to the trust. This power to control the trusts' share of partnership income was not only latent but was actually exercised by the taxpayers, as was brought out by the uncontradicted testimony of taxpayers' witness, Harold V. Bowen, their own certified public accountant. (R. 247, 261.) Such control was manifested in the power to change the method of allocating income between the grantors and the trusts; the power to make mere bookkeeping entries in the partnership's books changing the nature of the trusts' investments in the partnership business; and the power to siphon off or increase the family partnership income by their relations with and the creation and operation of the taxpayers' other business enterprises, such as their corporation.

A. *Power to change the method of allocating income between the grantors and the trusts*

Taxpayers could and did control the trust income by changing the method of allocating the partnership income between the taxpayer-grantors and the trusts. They were not held to a specific method of allocation because their executed agreements stated only that partnership income shall be allocated between the grantors and their respective trusts according to the federal tax law. (Exs. 24, 25, Appendix B, *infra.*)

Apparently, the taxpayers' original intention was

to allocate income between the grantors and their trusts according to the ratio between the interest in the partnership owned by each trust and the interest each grantor retained. (R. 230, 231; Ex. 28, Appendix B, *infra.*) According to the figures furnished by the taxpayers to the Washington State Tax Commission, in connection with the state gift tax, the Kuney, Sr., trust would receive 16.45% of Kuney, Sr's. income or 9.038% of total income (income was to consist of profits minus salaries paid to taxpayers as managing partners) and the Kuney, Jr., trust was to receive 20.05% of his share or 9.038% of total income. (Ex. 28, Appendix B, *infra.*) Even assuming the partnership profits were to be divided 50-50 (cf. R. 146, 147-148; 181; 290) between Kuney, Sr., and Kuney, Jr., before the allocation of income between grantors and their trusts, the trusts should have received 8.225% and 10.025%, respectively. (Ex. 28, Appendix B, *infra.*) The actual ratio of partnership capital possessed by the respective grantors and their trusts, according to figures stated by taxpayers themselves (contained in Schedule A forming part of the appendix to taxpayers' brief, following Br. 6a), was made to fluctuate as appears from the following table:

	Sr. Trust	Jr. Trust
1952	8.335%	10.230%
1953	22.74%	22.18%
1954	23.90%	22.62%
1955	28.88%	26.90%
1956	33.06%	31.10%
1957	23.82%	22.92%
1958	29.04%	28.48%

On cross-examination, Mr. Bowen testified (R. 236-237):

Q. And in the original 1955 return, he got 41.6 per cent of the income and his trust for John R. was 8.84 per cent?
A. Yes.

* * * *

Q. Now in the Bible,[3] Senior goes down to 16.99?

A. Yes.

Q. And the son's John R.'s, goes up from 8.84 up to 33?

A. Yes.

Q. 33.66?

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[3] The "Bible" is a series of journal vouchers written by Kuney, Sr., and referred to as such in the course of the trial. (R. 180-181; Ex. G.) Journal vouchers 4 (Ex. G, Appendix B, *infra*), demonstrates what little substantive effect taxpayers gave to the formalities they underwent. The journal entry states that profits were to be divided on the basis of total capital investment but then the entry directly underneath that statement divides profits on the basis of investment in fixed assets. (R. 256-257.)

A. Yes.

Q. In the beginning Senior had almost five times as much income as John R.?

A. That is right.

Q. But the time we come to what the Bible says, we got about twice as much for John R. as we have the father?

A. Yes.

The testimony then goes on to show that by the amended returns the amounts to Kuney, Sr., and the trust for his child were yet another percentage. This additional change was explained as resulting from a discovery of some property in California worth $305,000, which value had not been used in dividing up the income—although there is no question but that the investment in the business was the same regardless of where the funds were invested. (But see R. 239.) Mr. Kuney, Sr., in response to this same line of questions stated (R. 196-197):

Q. Could you explain for us, Mr. Kuney, why for the Bible in 1955 that your interest in the income was 16.99, John R.'s income was 33.66, and that for the amended return which you filed 4/14/58, your share of income was 28 per cent and John R.'s was 22.4? How do you explain that, Mr. Kuney, if your distribution was always in accordance with capital interest which you could not control?

A. I believe I can explain that quite easily.

Q. Please do, sir.

A. You state that in one original return it was one way and on an amended return it was another way, did you not?

Q. This is the Bible?

A. What?

Q. This is the Bible — subsequent to the Bible you prepared an amended return—so I might state this, this is in 1957—this is in 1957 while we are still trying to figure out what happened back in 1955 and in 1957 concerning 1955 in your Bible you say 17 per cent, in your amended return you say 28 per cent. In one your son has more and in the other your son has less?

A. Yes.

Q. Its determination is all in accordance with capital interest which you do not recall?

A. Do you want an explanation?

Q. Yes, we want you to explain.

Q. First it is an amended return. Bear that in mind. That means there is a change of figures by necessity. That is enough explanation.

Q. (By Mr. Biggins): That is the only one you care to give?

A. That is sufficient.

While the original intention was to allocate in-

come on the basis of the ratio of capital investments in the partnership (R. 230-231), after about two years the method of allocating income between the grantors and their trusts was changed to a method based upon the ratio of investments in fixed assets held by the partnership and a separate account was established for investments in the firm by the various parties which exceeded their respective investments in fixed assets (R. 245, 246). These separate accounts were established by the directive of Kuney, Sr., and were designated capital surplus accounts. (R. 246-247.) Taxpayers had complete power over the allocation of partnership income between the trusts and themselves because they could simply change the balances in investment in the fixed asset accounts and the capital surplus accounts by mere book entries. Mr. Bowen testified (R. 247):

> Q. All right. But capital surplus accounts were established in this partnership by the directive of MJK, weren't they?
>
> A. Yes.
>
> Q. And that was this personal account — this personal surplus account you were talking about on the blackboard of $740,000?
>
> A. Yes.
>
> Q. Which was under their control, we have established that?

A. Yes.

Q. And under their control, they could determine the amount of income distributed to them, we established that?

A. Yes.

Q. Now, it is equally true, unless you want to go all the way through this, Mr. Bowen, it is equally true that sometimes in some of these years they computed the interest on this (indicating)—

The Court: On what?

Q. (Continuing): — total investment, and in other years they computed it on breakdown, including your so-called fixed assets? They went back and forth, that is true, isn't it? Must I go through these, or don't you know?

A. Generally speaking, I think that is correct.

The witness further testified that the taxpayers directed the earnings one way at one time and one way at another (R. 261), although he seemed to feel the treatment became consistent in 1957, effective as of 1955 when the taxpayers decided that rental income should be paid to the partnership from the corporation on the basis of investment in fixed assets only (R. 260). Clearly, however, during the tax years 1952, 1953 and 1954, the method was subject to change, indeed it was changed by the taxpayers. (R. 261.)

The record is also clear that the grantors of the trust could control the trust income by withdrawing amounts from the trust capital and carrying the amounts as partnership loans payable on which interest would be paid. In other words, by simply changing an account from capital to loan the shares of the profits could be controlled. That there was power to make such changes cannot be doubted since they were actually made in the year 1952, the first year of operation. (R. 136-137.)

Furthermore, the income to be paid as salaries was controlled by the grantors and they in fact provided that their salaries were to be paid out of capital gains to the extent thereof. (R. 181, 248-249.) Certainly payment by way of capital gains rather than by way of ordinary income is a substantial benefit to the person entitled to control such a determination in his own favor and is a control over income not generally enjoyed by one partner as opposed to the other partners in a *bona fide* business partnership. Taxpayers plainly were attempting to impose upon the trusts the obligation to take a larger part of the partnership income as ordinary income and were attempting to attribute to themselves — to the prejudice of the trusts —the advantage of a disproportionate part of the capital gains earned by the partnership.

In any event, such an agreement should not be effective for tax purposes. Allocating capital gains to the partner's salaries has no apparent business purpose and will not affect the dollar amount of any partner's share of the total partnership income or loss so that its only purpose must have been to reduce the taxpayer's individual income taxes. Section 704(b)(2) of the Internal Revenue Code of 1954 and the Regulations (Section 1.704-1(b)(2)) very clearly prevent such manipulation of tax consequences by the use of a partnership agreement. (Appendix A, *infra.*)

B. *Taxpayers could draw off income from the family partnership, siphoning the income into their own business interests*

In addition to their control over the allocation of profits between the parties, taxpayers had complete control over the amount of income which could become available to the family partnership. On June 1, 1953, they removed the contracting business from the partnership, leaving only the equipment and other fixed assets. (R. 126-127.) Originally the trusts were to have an interest in the contracting business (R. 165; Ex. Q, Appendix B, *infra*) and in fact the stock was issued to the partnership (R. 167, 171; Ex. Q, Appendix B, *infra*) (meeting of February 7, 1957)). However, subsequently, in February, 1957, the stock issued

to the partnership in exchange for the contracting business was recalled and cancelled as "incorrectly issued" and instead stock was issued to the taxpayers only, Kuney, Sr., and Kuney, Jr. (R. 166, 167-168.) This action was given retroactive effect. (R. 173, 186-187; Ex. A, Br. 10.)

Max Kuney, Sr., conceded, on cross-examination, that he had been mistaken in answering on deposition that "The trusts have never had any interest in the profits and losses of the corporation." (R. 169, 170-171.) He then testified (R. 171-172):

> Q. But this much we are very clear on, I believe, then, at this time, Mr. Kuney, that in the beginning the children, Jeff, Caroline, and John did have an interest in the corporation?
>
> A. Yes.
>
> * * * *
>
> Q. (By Mr. Biggins): They were later deprived of that interest, weren't they?
>
> A. The investment was placed elsewhere, and they were deprived of their interest in the corporate stock, and their money was invested elsewhere.
>
> Q. They were deprived of their interest in the corporation, weren't they?
>
> The Court: Please answer directly to the question.

A. Yes.

Q. (By Mr. Biggins): And all they had left was the interest in the fixed assets which were leased to the corporation, leased or rented, that is all?

A. That is what they had.

Q. And you have never in your long business life ever treated a business partner that way now, have you?

A. (No response.)

Taxpayers in their brief (p. 10), contend that this action was taken in the best interests of the trust beneficiaries. Clearly the record fails to so indicate. (R. 186-187.) Kuney, Sr., testified (R. 138):

Q. Did the formation of the corporation in any way reduce the share of profit earned by the trust?

A. Well, as it turned out, as a matter of fact, it happened to be beneficial to them, but we didn't exactly foresee it. It happens that the corporation had a bad year in 1959, but that certainly wasn't anticipated.[4]

In any event, it is clear evidence of a retention and

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[4] The year the assets to the corporation were retained by the partnership the trusts' earnings were much greater than they were in the following four tax years. Thus, for the taxable years 1952, 1953 and 1954, income earned by both trusts was, according to the taxpayers' brief (Schedule A following Br. 6A), \$74,897.51, \$14,778.43, and \$48,721.13.

exercise of control over income by taxpayers. After taxpayers knew the exact amounts of income earned by the contracting business they were able and did determine retroactively whether or not the trusts would share in that income as stockholders or as mere lessors of equipment and other assets.

As of the date the corporation was organized, the total income earned by the family partnership was derived from its dealings with taxpayers' corporation. The partnership received rental payments, or interest payments in lieu of rent, at the discretion and within the control of the taxpayers. The first rental agreement (May 14, 1953) provided that rental rates shall be as "agreed upon between the parties." (Ex. 33, Appendix B, *infra.*) This agreement was signed only by Kuney, Sr., both as partner of the family partnership, and as president of the corporation. (Ex. 33, Appendix B, *infra.*) Then on March 20, 1956, Max J. Kuney announced at the corporation's meeting of shareholders, directors and officers that rentals should consist of interest on investment, allowed or allowable depreciation, plus 30%, and that any controversies over the rentals would be settled by the federal income tax laws and the opinions of the revenue agents. (R. 326-327; Ex. Q, Appendix B, *infra.*) On May 1, 1956, at a stockholder meeting presided over by Kuney, Sr.

(there was no indication as to who else was present), the minutes stated that "it was agreed that establishment of the exact rates and procedures would be postponed pending receipt of the examining revenue agent's report." (Ex. Q, Appendix B, *infra.*) The minutes of the special meeting of February 7, 1957, stated that, since the revenue agent had taken the position that the fixed assets held and rented by the partnership had in substance been transferred to the corporation, the rental charges on fixed assets for the "years 1955 and 1956 should best be held in abeyance until the treasury's position on this question was better known." (Ex. Q, Appendix B, *infra.*) It was then provided that rentals would subsequently be charged retroactively and the "corporation shall pay interest on the partner's investment in fixed assets [during the years in question] at the interest rate corporation paid the banks for borrowed money during those years." (R. 244; Ex. Q, Appendix B, *infra.*) Mr. Bowen testified that the methods for charging rent changed between 1955 and 1956 even though the management directive stated that rentals for *both* 1955 and 1956 should be based upon interest rates. (R. 245.) He also testified that the method of determining rental income was "finalized" in 1957 (R. 260), but that in 1959 no rent was charged at all (R. 246). If this really had been a *bona fide* partnership situation, the amounts

of rental income and expense would have depended upon negotiation between the two entities, with all interests represented and protected, and would not have been wholly dependent upon the revenue agent's opinion as to the reasonableness of the business expense deduction claimed by taxpayers' corporation.

This evidence emphatically establishes three points: (1) Decisions often were made by taxpayer Kuney, Sr., in his personal capacity and sole discretion, as corporation president without any negotiation with the partnership; (2) decisions as to allocation of income between the parties (in the above instances between the corporation and the partnership) were dependent solely upon federal tax consequences with no apparent attention to the fairness of the rates, the going market rates, or the interests of the trust beneficiaries; and (3) taxpayers had complete control over the amount of income the partnership could receive from the contracting business.

In summary, it can be stated without equivocation that the taxpayer-grantors did retain and did exercise control, both direct and indirect, over income distribution.

V

TAXPAYERS' CONTROL OVER THE ASSETS ESSENTIAL TO THE PARTNERSHIP BUSINESS WAS ABSOLUTE

Taxpayers' control over the assets essential to the partnership business was absolute. They were bought and sold constantly by the grantors. (R. 173.) They earned income for the partnership only as they were rented to the taxpayers' corporation.[5] Partnership assets were even pledged as security on loans to the corporation in which the trusts had no interest whatever. Mr. Coon, taxpayers' banker, testified (R. 208):

> Q. So I may be clear on that, you have made periodic credit investigations of this company?
>
> A. I should say so.
>
> Q. And you do loan money to them?
>
> A. That is true.
>
> Q. And you accordingly know that the partnership has pledged and/or made available to the corporation its fixed assets?
>
> A. That is right.

Mr. Max Kuney, Jr., testified (R. 295-296):

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[5] Most of the partnership equipment being used by the corporation was rent free under the rental agreement since it had no book value and allegedly the maintenance costs were high. (R. 325-326.)

Q. And I asked him [Mr. Coon] if it is true that the corporation ever pledged some of this property for the money that the corporation wanted to borrow at the bank? Do you remember a question such as that?

A. Yes.

Q. And his answer was yes?

A. That is right.

Q. And that is true, isn't it?

A. That is true.

Q. And who does that property belong to?

A. It belongs to the various partners.

Q. But who is borrowing the money, the corporation?

A. The corporation is signing the notes on the money.

Q. And at that time did the children have any interest at all in the corporation?

A. No, sir.

VI

THE PURPORTED TRANSFER AND THE SUBSEQUENT PARTNERSHIP AND TRUST TRANSACTIONS WERE ALL MADE FOR TAX AVOIDANCE PURPOSES, THUS CONFIRMING THE FICTITIOUS NATURE OF THE TRANSFER

The motives for the gift of a partnership interest between members of a family are not material where the reality of the transfer or interest is otherwise satisfactorily established. However, the presence or absence of a tax-avoidance motive is one of the more important factors to be considered in determining the reality of a transfer by gift of the ownership of a capital interest in a partnership. Treasury Regulations on Income Tax (1954 Code), Section 1.704-1-(e)(2)(i) and (x), Appendix A, *infra.* The Tax Court has stated in *Reddig* v. *Commissioner*, 30 T.C. 1382, 1395:

> The motive to save taxes, of course, is not incompatible with the intention to create a bona fide partnership but where it appears, as here, that the parties merely executed instruments of trust and partnership which contain the language of formal requirements of a new partnership but also language retaining control in donors and then proceeded, in effect, to ignore any new relationship, then we cannot escape the implication that the new arrangement was a sham, and the ownership of the donees was not the real ownership demanded by the statute.

Taxpayers at bar never even executed a partnership agreement making the trustees partners and the record is replete with evidence that the transfer (R. 106-110, 143, 241), the trust provisions (R. 116), the provisions governing division of profits between grantor and trustee (R. 157, 160, 161; Exs. 24, 25, Appendix B, *infra*), the determination of rental rates payable by the corporation to the partnership (R. 316-320), the trust distributions to beneficiaries (R. 194-195), and the additional gifts to the taxpayer's children (R. 250, 251, 299, 300, 306), all were made to avoid federal taxes. The taxpayers transferred their interests in the partnership to themselves, as trustees, retaining all their power and control over the partnership; they were able to retain the trust investments and income in the partnership and they could, and did, control the partnership assets and both the total amount of income the partnership could earn from its dealings with the corporation and the portions of partnership income distributable to the trust. Clearly, the only substantial effect of the purported transfer was to shift income from the taxpayers (Kuney, Sr., was in the 90% tax bracket (R. 143)) to their children without making any real change in the economic situation of the group or in the control or management of the business. The fact that the trusts' earnings increased and that their retention in the business in-

creased the trusts' capital interests in the partnership only buttresses the District Court's findings. The taxpayers retained and exercised such control over the business, its income and its assets that a jury could not reasonably find that the transfer was *bona fide* and effective for tax purposes. The increased taxable earnings of the trusts were the purpose of the tax avoidance scheme. The more tax paid by the trusts the less the tax of the entire family group became.

The taxpayers had such control over the allocation of income between themselves and their children that it could be exercised retroactively, after the total amount of the family income from all sources was known. The fact that trust income was retained as additional investment in the business rather than distributed to the trust or its beneficiaries is additional evidence of the lack of reality and *bona fides* of the purported gift; indeed, it allowed the taxpayers to control and change the profit-sharing ratios. When the donors do not make the trustees partners but only owners of interest in the partnership, when the trustees have never taken any action which appears to have been taken solely in the interests of the trust beneficiaries, and when the donors have, in their own right, retained and exercised the control they have in the instant case, selfserving assertions that taxpayers

considered themselves trustees are insufficient evidence for a jury to find *bona fide* gifts of full and complete ownership of the partnership interests.

Taxpayers claim a *bona fide* partnership was formed with themselves as trustees serving as separate independent partners acting solely in the interest of the trust beneficiaries. The Director submits that the record is void of any evidence indicating this and, on the contrary, the taxpayers retained and exercised such complete and absolute control over the transferred property and the income earned from the property as to clearly characterize the purported gift as a mere paper transaction — a sham for tax purposes. Max Kuney, Jr., testified, on direct examination (R. 272):

> Q. It [creation of the trust] simply changed the persons who owned an interest in it?
>
> A. It changed the ownership of interest. It didn't change the management at that time, and I certainly am unaware today if there is any requirement for a business purpose under this law.

Clearly, there was no change in management and control of the property transferred, the interest in the partnership. All that occurred was a transfer of rights to income, hedged about by restrictions and determined after earned; and, a transfer of corpus, which the taxpayers, as trustees, need not distribute until the youngest child of each respective donee-beneficiary

attained the age of twenty-one years, or would have attained such age if living. (R. 360-361, 372-373.) As Max Kuney, Sr., aptly put it (R. 128):

> Q. Why do you call yourselves operating partners?
>
> A. We are adults as distinguished from the children and the trustees who do nothing.

VII

IN ANY CASE, THE GRANTORS RETAINED SO MANY OF THE INCIDENTS OF OWNERSHIP THAT THEY SHOULD CONTINUE TO BE RECOGNIZED AS SUBSTANTIAL OWNERS OF THE DONATED PARTNERSHIP INTERESTS

Taxpayers maintain, in effect, that where there is a valid assignment of income-producing property, effective as between the parties under local law, the only question that remains for a determination of the tax consequences is whether or not the donors intended in good faith to divest themselves of substantial ownership. Their brief seems to rest on the proposition that (p. 21):

> *The most that can be made out of controls retained by grantors of trusts in family partnership cases is that they are tests of good faith, but only tests. Where good faith really and truly exists, no degree of control can change that fact.*

But this statement is incorrect. Notwithstanding good

faith, to shift the incidence of income tax from the grantors, there also must be a complete transfer divesting them of the substantial attributes of ownership, dominion and control, as well as the technical forms of ownership.

The Supreme Court in the *Culbertson* case *supra*, p. 748, remanded a family partnership case to the Tax Court for a finding as to which of the sons "was there a bona fide intent that they be partners in the conduct of the cattle business, either because of services to be performed during those years, or because of contributions of capital of which they were the true owners, as we have defined that term in the *Clifford*, *Horst*, and *Tower* cases." (P. 748.) The Court made it clear that a donee of property could invest the property in a family partnership and become a true partner. However, the Court stated (p. 739) that it would violate the first principle of income taxation to tax persons who contribute nothing during the tax period. (P. 739.) It is clear, the District Director submits, that neither the Supreme Court nor this Court would tax a trust which was not the real or substantial owner of the income-producing property, nothwithstanding the good faith intent of the trust grantor. The Supreme Court said that the donee partners must have participated (in the sense of contributing labor, skill

or capital — no matter what the source) in the business during the tax year and stated (p. 740):

> The vagaries of human experience preclude reliance upon even good faith intent as to future conduct as a basis for the present taxation of income.

Also, this Court in *Toor* v. *Westover*, 200 F. 2d 713, 714, was concerned with the power of the donee to transfer or terminate his interest in the partnership and the Court concluded that the taxpayer remained the substantial owner of the property purportedly given away.

The transferee must receive dominion and control of the partnership interest. Treasury Regulations 118 (1939 Code), Section 39.191-1 (3); Treasury Regulations (1954 Code), Section 1.704-1 (e)(iii). Income is not taxed as intended to be earned but as actually earned. And Congress did not intend to change this rule with either Section 671 (Appendix A, *infra*) or Section 704 (e) of the Internal Revenue Code. See H. Rep. No. 1337, 83rd Cong., 2d Sess., pp. A 211, A 212 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4352). (Recommending enactment of Section 671.) (Appendix A, *infra.*)

H. Rep. No. 586, 82d Cong., 1st Sess., p. 33 (1951-2 Cum. Bull. 357, 381) (recommending amendment of

Section 3797(a)(2) of, and adding Section 191 to the 1939 Code, now Section 704(e) of the 1954 Code), states:

> The amendment leaves the Commissioner and the courts free to inquire in any case whether the donee or purchaser actually owns the interest in the partnership which the transferor purports to have given or sold him. Cases will arise where the gift or sale is a mere sham. *Other cases* will arise where the transferor retains so many of the incidents of ownership that he will continue to be recognized as a substantial owner of the interest which he purports to have given away, as was held by the Supreme Court in an analogous trust situation involved in the case of *Helvering* v. *Clifford*, * * *. (Emphasis supplied.)

And in *Spiesman* v. *Commissioner*, 260 F. 2d 940, 948, this Court made it plain that the law did not delete the requirement that the donor must, "in fact," relinquish dominion and control over the purported gifts. Under principles of *Helvering* v. *Clifford*, the income of the instant trusts is taxable to the taxpayers.

In the instant case, the trustees obtained only such dominion and control of the purportedly transferred property which the taxpayers, as managing partners of the family partnership and as controllers of the contracting corporation, would grant them.

The trustees did possess some powers exercisable for the benefit of the beneficiaries as distinguished from those vested in the taxpayers for their own bene-

fit, but these powers attached not to the property but only to the income which taxpayers allowed the partnership to receive and only the portions of such income allocated by taxpayers to the trust. All the facts and circumstances which require this conclusion have been set out previously and will not be repeated. In conclusion, taxpayers not only failed to offer sufficient evidence that they in good faith intended to join together in partnership with themselves as separate and independent trustees, but they also failed to offer sufficient evidence of a vesting of dominion and control over the property in themselves as fiduciaries.

VIII

THE PROVISIONS OF THE TRUSTS PERMIT DISTRIBUTION OF INCOME TO THE GRANTORS

The practical circumstances of the trust instruments and the relation of the grantors and respective trustees to each other must be afforded consideration. Here the trusts were essentially reciprocal; the grantor of one was the trustee of the other and both were in business with each other and purportedly sought to bring the trusts into the same business. Broad discretion is conferred by the trust instruments on the trustees, but the genuineness of the trusts and the reality of the discretion are brought into serious question when it is realized that in practice the wishes and acts of

one trustee or grantor might readily become a *quid pro quo* for acts and wishes of the other. (See R. 250, 251, 305, 306.) This situation becomes even more pointed when attention is directed to the provision of each of the trusts which allows the respective trustees, during such time as an income beneficiary is under twenty-one years of age, to pay income to the parents of the beneficiary for the use and benefit of the beneficiary "without any responsibility for the application thereof by such guardian or parent * * *." (Ex. 1, R. 362; Ex. 2, R. 373-374.) In the same section of each of the trusts the respective trustees are authorized to use net income "towards the maintenance, education, enjoyment, health and welfare" of the beneficiary. Thus, inferably the parent-grantor certainly may use the income for any such purposes, including enjoyment. The point to be emphasized is, however, that thereby the trust income may be paid back to the respective grantors for their use as they see fit substantially not subject to any supervision. The respective instruments do not require supervision by the trustees and in this situation of close relationship and of reciprocal trusts it seems certain that the grantor-parents would not be subject to any real restrictions in their use of the income. Not only do the realities of this situation throw grave doubt upon the genuineness of the trusts, but they serve as a basis for contending that

the respective grantors should be treated as the owners of the trusts within the meaning of Section 677 of the Internal Revenue Code of 1954 (Appendix A, *infra*) (substantially identical to Section 167 of the Internal Revenue Code of 1939). Nor does the exception contained in Section 677 (b) apply here, for as the Treasury Regulations on Income Tax (1954 Code) provide (Section 1.677(b)-1(e):

> (e) The general rule of Section 677(a), and not Section 677(b), is applicable if discretion to apply or distribute income of a trust rests solely in the grantor, or in the grantor in conjunction with other persons, unless in either case the grantor has such discretion as trustee or co-trustee.

S. Rep. No. 627, 78th Cong., 1st Sess., p. 68 (1944 Cum. Bull. 973, 1023) is to the same effect. In the case of these trusts the discretion by the respective grantor-parents to apply or distribute income is not conferred upon each as trustee of the trusts of which each respectively is grantor. Considering that the trusts were set up with tax avoidance in mind, the loophole which the provisions of the trust instruments affords for distribution of income to the grantors cannot be overlooked.

In summary then, the possibility that income may be distributed to the grantors to be applied in their discretion seriously reflects upon the genuineness of

these reciprocal trusts and on this record and, in the light of the provisions of Section 677 and its earlier cognate, constitutes additional ground for sustaining the ruling that the grantors should here be treated as owners of the respective trusts.

CONCLUSION

For the reasons given above, the decision of the District Court is correct and should be affirmed.

Respectfully submitted,

LOUIS F. OBERDORFER,
Assistant Attorney General.

LEE A. JACKSON,
I. HENRY KUTZ
DONALD P. HORWITZ,
Attorneys,
Department of Justice,
Washington 25, D. C.

MARCH, 1962

APPENDIX A

Internal Revenue Code of 1939:

SEC. 167. INCOME FOR BENEFIT OF GRANTOR.

(a) Where any part of the income of a trust—

(1) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, held or accumulated for future distribution to the grantor; or

(2) may, in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income, be distributed to the grantor; or

(3) is, or in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income may be, applied to the payment of premiums upon policies of insurance on the life of the grantor (except policies of insurance irrevocably payable for the purposes and in the manner specified in section 23(o), relating to the so-called "charitable contribution" deduction);

then such part of the income of the trust shall be included in computing the net income of the grantor.

(b) As used in this section the term "in the discretion of the grantor" means "in the discretion of the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of the part of the income in question."

(c) [as added by Sec. 134(a) of the Revenue Act of 1943, c. 63, 58 Stat. 21] Income of a trust shall not be considered taxable to the grantor under subsection (a) or any other provision of this chapter merely because such income, in the discretion of another person, the trustee, or the grantor acting as trustee or co-trustee may be applied or distributed for the support or maintenance of a beneficiary whom the grantor is legally obligated to support or maintain, except to the extent that such income is so applied or distributed. In cases where the amounts so applied or distributed are paid out of corpus or out of other than income for the taxable year, such amounts shall be considered paid out of income to the extent of the income of the trust for such taxable year which is not paid, credited, or to be distributed under section 162 and which is not otherwise taxable to the grantor.

(26 U.S.C. 1952 ed., Sec. 167.)

SEC. 191 [as added by Sec. 340(b) of the Revenue Act of 1951, c. 521, 65 Stat. 452]. FAMILY PARTNERSHIPS.

In the case of any partnership interest created by gift, the distributive share of the donee under the partnership agreement shall be includible in his gross income, except to the extent that such share is determined without allowance of reasonable compensation for services rendered to the partnership by the donor, and except to the extent that the portion of such share attributable to donated capital is proportionately greater than the share of the donor attributable to the donor's capital. The distributive share of a partner in the earnings of the partnership shall not be diminished because of absence due to military service.

For the purpose of this section, an interest purchased by one member of a family from another shall be considered to be created by gift from the seller, and the fair market value of the purchased interest shall be considered to be donated capital. The "family" of any individual shall include only his spouse, ancestors, and lineal descendants, and any trust for the primary benefit of such persons.

(26 U.S.C. 1952 ed., Sec. 191.)

SEC. 3797. DEFINITIONS

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

* * * *

(2) [as amended by Sec. 340(a) of the Revenue Act of 1951, *supra*]. *Partnership and Partner.*—The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term "partner" includes a member in such a syndicate, group, pool, joint venture, or organization. A person shall be recognized as a partner for income tax purposes if he owns a capital interest in a partnership in which capital is a material income-producing factor, whether or not such interest was derived by purchase or gift from any other person.

* * * *

(26 U.S.C. 1952 ed., Sec. 3797.)

Internal Revenue Code of 1954:

SEC. 671. TRUST INCOME, DEDUCTIONS, AND CREDITS ATTRIBUTABLE TO GRANTORS AND OTHERS AS SUBSTANTIAL OWNERS.

Where it is specified in this subpart that the grantor or another person shall be treated as the owner of any portion of a trust, there shall then be included in computing the taxable income and credits of the grantor or the other person those items of income, deductions, and credits against tax of the trust which are attributable to that portion of the trust to the extent that such items would be taken into account under this chapter in computing taxable income or credits against the tax of an individual. Any remaining portion of the trust shall be subject to subparts A through D. No items of a trust shall be included in computing the taxable income and credits of the grantor or of any other person solely on the grounds of his dominion and control over the trust under section 61 (relating to definition of gross income) or any other provision of this title, except as specified in this subpart.

(26 U.S.C. 1958 ed., Sec. 671.)

SEC. 677. INCOME FOR BENEFIT OF GRANTOR.

(a) *General Rule.*—The grantor shall be treated as the owner of any portion of a trust, whether or not he is treated as such owner under section 674, whose income without the approval or consent of any adverse party is, or, in the discretion of the grantor or a non-adverse party, or both, may be—

(1) distributed to the grantor;

(2) held or accumulated for future distribution to the grantor; or

(3) applied to the payment of premiums on policies of insurance on the life of the grantor (except policies of insurance irrevocably payable for a purpose specified in section 170(c) (relating to definition of charitable contributions)).

* * * *

(b) *Obligations of Support.*—Income of a trust shall not be considered taxable to the grantor under subsection (a) or any other provision of this chapter merely because such income in the discretion of another person, the trustee, or the grantor acting as trustee or co-trustee, may be applied or distributed for the support of maintenance of a beneficiary whom the grantor is legally obligated to support or maintain, except to the extent that such income is so applied or distributed. * * *

(26 U.S.C. 1958 ed., Sec. 677.)

SEC. 704. PARTNER'S DISTRIBUTIVE SHARE.

(a) *Effect of Partnership Agreement.*—A partner's distributive share of income, gain, loss, deduction, or credit shall, except as otherwise provided in this section, be determined by the partnership agreement.

(b) Distributive Share Determined by Income or Loss Ratio. — A partner's distributive share of any item of income, gain, loss, deduction, or credit shall be determined in accordance with his distributive share of taxable income or loss of the partnership, as described in section 702(a)-(9), for the taxable year, if—

(1) the partnership agreement does not provide as to the partner's distributive share of such item, or

(2) the principal purpose of any provision on the partnership agreement with respect to the partner's distributive share of such item is the avoidance or evasion of any tax imposed by this subtitle.

* * * *

(e) *Family Partnerships*—

(1) *Recognition of interest created by purchase or gift.*—A person shall be recognized as a partner for purposes of this subtitle if he owns a capital interest in a partnership in which capital is a material income-producing factor, whether or not such interest was derived by purchase or gift from any other person.

* * * *

(26 U.S.C. 1958 ed., Sec. 704.)

Treasury Regulations on Income Tax (1954 Code):

Section 1.704.1. PARTNER'S DISTRIBUTIVE SHARE.

* * * *

(b) *Distributive share determined by income or loss ratio.*

* * * *

(2) If the principal purpose of any provision in the partnership agreement determining a partner's distributive share of a particular item is to avoid or evade the Federal income tax, the provision shall be disregarded and the partner's distributive shares of that item shall be determined in accordance with the ratio in which the partners

divide the general profits or losses of the partnership (as described in section 702(a)(9)). In determining whether the principal purpose of any provision in the partnership agreement for a special allocation is the avoidance or evasion of Federal income tax, the provision must be considered in relation to all the surrounding facts and circumstances. Among the relevant circumstances are the following: Whether the partnership or a partner individually has a business purpose for the allocation; whether the allocation has "substantial economic effect", that is, whether the allocation may actually affect the dollar amount of the partners' shares of the total partnership income or loss independently of tax consequences; whether related items of income, gain, loss, deduction, or credit from the same source are subject to the same allocation; whether the allocation was made without recognition of normal business factors and only after the amount of the specially allocated item could reasonably be estimated; the duration of the allocation; and the overall tax consequences of the allocation. * * *

* * * *

(e) *Family partnerships*—(1) *In general*—(i) *Introduction.* The production of income by a partnership is attributable to the capital or services, or both, contributed by the partners. The provisions of subchapter K, chapter 1 of the Code, are to be read in the light of their relationship to section 61, which requires, inter alia, that income be taxed to the person who earns it through his own labor and skill and the utilization of his own capital.

* * * *

(iii) *Requirement of complete transfer to donee.* A donee or purchaser of a capital interest in a partnership is not recognized as a partner

under the principles of section 704(e)(1) unless such interest is acquired in a bona fide transaction, not a mere sham for tax avoidance or evasion purposes, and the donee or purchaser is the real owner of such interest. To be recognized, a transfer must vest dominion and control of the partnership interest in the transferee. The existence of such dominion and control in the donee is to be determined from all the facts and circumstances. A transfer is not recognized if the transferor retains such incidents of ownership that the transferee has not acquired full and complete ownership of the partnership interest. Transactions between members of a family will be closely scrutinized, and the circumstances, not only at the time of the purported transfer but also during the periods preceding and following it, will be taken into consideration in determining the bona fides or lack of bona fides of the purported gift or sale. A partnership may be recognized for income tax purposes as to some partners but not as to others.

*   *   *   *

(2) *Basic tests as to ownership*—(i) *In general.* Whether an alleged partner who is a donee of a capital interest in a partnership is the real owner of such capital interest, and whether the donee has dominion and control over such interest, must be ascertained from all the facts and circumstances of the particular case. Isolated facts are not determinative; the reality of the donee's ownership is to be determined in the light of the transaction as a whole. The execution of legally sufficient and irrevocable deeds or other instruments of gift under State law is a factor to be taken into account but is not determinative of ownership by the donee for the purposes of section 704(e). The reality of the transfer and of the donee's ownership of the property attributed to him are to be ascertained from the conduct of the parties with

respect to the alleged gift and not by any mechanical or formal test. Some of the more important factors to be considered in determining whether the donee has acquired ownership of the capital interest in a partnership are indicated in subdivisions (ii) to (x), inclusive, of this subparagraph.

(ii) *Retained controls.* The donor may have retained such controls of the interest which he has purported to transfer to the donee that the donor should be treated as remaining the substantial owner of the interest. Controls of particular significance include, for example, the following:

(a) Retention of control of the distribution of amounts of income or restrictions on the distributions of amounts of income (other than amouts retained in the partnership annually with the consent of the partners, including the donee partner, for the reasonable needs of the business). If there is a partnership agreement providing for a managing partner or partners, then amounts of income may be retained in the partnership without the acquiescence of all the partners if such amounts are retained for the reasonable needs of the business.

(b) Limitation of the right of the donee to liquidate or sell his interest in the partnership at his discretion without financial detriment.

(c) Retention of control of assets essential to the business (for example, through retention of assets leased to the alleged partnership).

(d) Retention of management powers inconsistent with normal relationships among partners. Retention by the donor of control of business management or of voting control, such as is common in ordinary business relationships, is not by itself to be considered as inconsistent with normal rela-

tionships among partners, provided the donee is free to liquidate his interest at his discretion without financial detriment. The donee shall not be considered free to liquidate his interest unless, considering all the facts, it is evident that the donee is independent of the donor and has such maturity and understanding of his rights as to be capable of deciding to exercise, and capable of exercising, his right to withdraw his capital interest from the partnership.

The existence of some of the indicated controls, though amounting to less than substantial ownership retained by the donor, may be considered along with other facts and circumstances as tending to show the lack of reality of the partnership interest of the donee.

(iii) *Indirect controls.* Controls inconsistent with ownership by the donee may be exercised indirectly as well as directly, for example, through a separate business organization, estate, trust, individual, or other partnership. Where such indirect controls exist, the reality of the donee's interest will be determined as if such controls were exercisable directly.

(iv) *Participation in management.* Substantial participation by the donee in the control and management of the business (including participation in the major policy decisions affecting the business) is strong evidence of a donee partner's exercise of dominion and control over his interest. Such participation presupposes sufficient maturity and experience on the part of the donee to deal with the business problems of the partnership.

(v) *Income distributions.* The actual distribution to a donee partner of the entire amount or a major portion of his distributive share of the business income for the sole benefit and use of the donee is substantial evidence of the reality of the

donee's interest, provided the donor has not retained controls inconsistent with real ownership by the donee. Amounts distributed are not considered to be used for the donee's sole benefit if, for example, they are deposited, loaned, or invested in such manner that the donor controls or can control the use or enjoyment of such funds.

(vi) *Conduct of partnership business.* In determining the reality of the donee's ownership of a capital interest in a partnership, consideration shall be given to whether the donee is actually treated as a partner in the operation of the business. Whether or not the donee has been held out publicly as a partner in the conduct of the business, in relations with customers, or with creditors or other sources of financing, is of primary significance. Other factors of significance in this connection include:

(a) Compliance with local partnership, fictitious names, and business registration statutes.

(b) Control of business bank accounts.

(c) Recognition of the donee's rights in distributions of partnership property and profits.

(d) Recognition of the donee's interest in insurance policies, leases, and other business contracts and in litigation affecting business.

(e) The existence of written agreements, records, or memoranda contemporaneous with the taxable year or years concerned, establishing the nature of the partnership agreement and the rights and liabilities of the respective partners.

(f) Filing of partnership tax returns as required by law.

However, despite formal compliance with the above factors, other circumstances may indicate that the donor has retained substantial ownership

of the interest purportedly transferred to the donee.

(vii) *Trustees as partners.* A trustee may be recognized as a partner for income tax purposes under the principles relating to family partnerships generally as applied to the particular facts of the trust-partnership arrangement. A trustee who is unrelated to and independent of the grantor, and who participates as a partner and receives distribution of the income distributable to the trust, will ordinarily be recognized as the legal owner of the partnership interest which he holds in trust unless the grantor has retained controls inconsistent with such ownership. However, if the grantor is the trustee, or if the trustee is amenable to the will of the grantor, the provisions of the trust instrument (particularly as to whether the trustee is subject to the responsibilities of a fiduciary), the provisions of the partnership agreement, and the conduct of the parties must all be taken into account in determining whether the trustee in a fiduciary capacity has become the real owner of the partnership interest. Where the grantor (or person amenable to his will) is the trustee, the trust may be recognized as a partner only if the grantor (or such other person) in his participation in the affairs of the partnership actively represents and protects the interests of the beneficiaries in accordance with the obligations of a fiduciary and does not subordinate such interests to the interests of the grantor. Furthermore, if the grantor (or person amenable to his will) is the trustee, the following factors will be given particular consideration:

(a) Whether the trust is recognized as a partner in business dealings with customers and creditors, and

(b) Whether, if any amount of the partner-

ship income is not properly retained for the reasonable needs of the business, the trust's share of such amount is distributed to the trust annually and paid to the beneficiaries or reinvested with regard solely to the interests of the beneficiaries.

*　　　*　　　*　　　*

(x) *Motive.* If the reality of the transfer of interest is satisfactorily established, the motives for the transaction are generally immaterial. However, the presence or absence of a tax-avoidance motive is one of many factors to be considered in determining the reality of the ownership of a capital interest acquired by gift.

*　　　*　　　*　　　*

The provisions of Section 39.191-1 of Treasury Regulations 118 (1939 Code) are substantially the same as those of Section 1.704-1(e) set out above.

H. Rep. No. 1337, 83rd Cong., 2d Sess., pp. A 211, A 212 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4352):

Section 671. *Trust income, deductions, and credits attributable to grantors and others as substantial owners.*

*　　　*　　　*　　　*

It is also provided in this section that no items of a trust shall be included in computing the income or credits of the grantor (or another person) solely on the grounds of his dominion and control over the trust under the provisions of section 61 (corresponding to sec. 22(a) of existing law). The effect of this provision is to insure that taxability of *Clifford* type trusts shall be governed solely by this subpart. However, this pro-

vision does not affect the principles governing the taxability of income to a grantor or assignor other than by reason of his dominion and control over the trust. Thus, this subpart has no application in situations involving assignments of future income to the assignor, as in *Lucas* v. *Earl* (281 U.S. 111), *Harrison* v. *Schaffner* (312 U.S. 579), and *Helvering* v. *Horst* (311 U.S. 112), whether or not the assignment is to a trust; nor are the rules as to family partnerships affected by this subpart.

APPENDIX B

EXHIBITS[6]

Exhibit No.	Description	Pages
24	Agreement dated February 11, 1952, between Max J. Kuney, Sr., and Max J. Kuney, Jr., as trustee with respect to division of profits	69
25	Agreement dated February 11, 1952, between Max J. Kuney, Jr., and Max J. Kuney, Sr., as trustee with respect to division of profits	69
28	Letter from Max J. Kuney, Jr., to Inheritance Tax Division, Washington State Tax Commissioner, dated April 7, 1953	70, 71, 72, 73
30	Financial statements of Max J. Kuney Company for year ended December 31, 1952	74, 75, 76, 77
31	Financial statements of Max J. Kuney Company for year ended December 31, 1953	78, 79, 80
32	Financial statements of Max J. Kuney Company for year ended December 31, 1954	81, 82, 83

[6] The exhibits are reproduced only in part.

EXHIBIT 24

AGREEMENT

The undersigned hereby agree that effective January 1, 1952, total Max J. Kuney income shall be distributed annually between Max J. Kuney and Trust Dated February 11, 1952, for Benefit of John R. Kuney, as provided by the rules of law then effective for family partnerships and in conformity with the provisions of said Trust.

Signed this 11th day of February, 1952.

MAX J. KUNEY

MAX J. KUNEY, JR.
Trust for Benefit of John R. Kuney
By: Max Kuney, Jr., Trustee

EXHIBIT 25

AGREEMENT

The undersigned hereby agree that effective January 1, 1952, total Max Kuney, Jr., income shall be distributed annually between Max Kuney, Jr., and Trusts Dated February 11, 1952, for Benefit of Max J. Kuney III and Caroline I. Kuney, as provided by the rules of law then effective for family partnerships and in conformity with the provisions of said Trusts.

Signed this 11th day of February, 1952.

MAX J. KUNEY, JR.

MAX J. KUNEY
Trust for Benefit of Max J. Kuney III
By: Max J. Kuney, Trustee

MAX J. KUNEY
Trust for Benefit of Caroline I. Kuney
By: Max J. Kuney, Trustee

EXHIBIT 28

April 7, 1953

State of Washington
Inheritance Tax Division
Tax Commission
Olympia, Washington

Attention: Mr. Harry F. Wood, Deputy Supervisor

Dear Sir:

In reply to your letter of March 19, 1953, relative to gifts in trust made by Max J. Kuney and the community of Max Kuney, Jr., and Constance K. Kuney.

Enclosed are separate donor's returns for Max Kuney, Jr. and Constance K. Kuney, together with completed matching donee returns, as requested in the second paragraph of your letter.

Also enclosed is one copy of the trust agreement under which the gift of Max J. Kuney was made, and one copy of the trust agreement under which the gift of Max Jr. and Constance K. Kuney was made, as requested in the fourth paragraph of your letter.

In regards to information requested in the fifth paragraph of your letter:

The Max J. Kuney Company is a partnership with operating divisions for four types of construction work. For trade reasons these divisions are operated under the different names — Max J. Kuney Company (Heavy Construction Division), Kuney Johnson Company (Building Division), Agutter Electric Company (Electric Division), and Tecler Aluminum Products (Manufacturing Division).

Max J. Kuney and Max Kuney, Jr., are the only partners and equal partners in the Max J. Kuney Company.

EXHIBIT 28

COPY

State of Washington, Inheritance Tax Division, Olympia, Wn.
April 7, 1953

The Max J. Kuney Company has 100% interest in all assets and operations held or undertaken in its own name. In addition, the Max J. Kuney Company has 50% interest with Lloyd W. Johnson in both Kuney Johnson Company and Tecler Aluminum Products and 50% interest with C. S. Greene in Agutter Electric Company.

In the case of both donor Max J. Kuney and Max Kuney, Jr. with co-donor Constance K. Kuney, the facts of the transfer were that $100,000.00 was withdrawn from the capital accounts of each donor and deposited to the credit of the appropriate trustee as provided by the enclosed trust agreement copies.

The percentage of his interest in the businesses transferred in trust by Max J. Kuney are as follows:

Total Capital Max J. Kuney after Trust Establishment	$507,815.16 —	83.55%
Total Capital Max Kuney, Jr., Trustee after Trust Establishment	$100,000.00 —	16.45%
Total Capital Before Trust Establishment	$607,815.16 —	100%

The percentage of his interests in the businesses transferred in trust by Max Kuney, Jr., with co-donor Constance K. Kuney are as follows:

Total Capital Max Kuney, Jr. After Trust Establishment	$398,635.47 —	79.95%
Total Capital, Max J. Kuney, Trustee, After Trust Establishment	$100,00.00 —	20.05%
Total Capital Before Trust Establishment	$498,635.47 —	100%

Profits are divided between partner Max J. Kuney and the trust he established and partner Max Kuney, Jr., and the trust he and co-donor Constance K. Kuney established in accordance with the above formula, but after reduction of divisable profits by allowance of salary for personal services direct to Max J. Kuney and Max Kuney, Jr.

EXHIBIT 28

State of Washington, Inheritance Division, Olympia, Wn.

April 7, 1953

Enclosed is a copy of the balance sheet contained in our certified financial statement of December 31, 1951, which is the balance sheet prepared closest to the date of the gift as requested in the sixth paragraph of your letter. This is a consolidated balance sheet of the Max J. Kuney Company and its operating divisions, and the net worth shown thereon is the total net worth of all partners in all divisions.

The net earnings of the Max J. Kuney Company from its own operations and the total net earnings of the operating divisions, before taxes and the distributions to partners, for the ten years preceding the gift are as follows:

Year	Max J. Kuney Co.	Kuney Johnson Co.	Agutter Electric Co.	Tecler Aluminum	Consolidated
1942	278,570.71	102,467.34			381,038.05
1943	238,941.47	4,629.48			243,570.95
1944	88,504.55	76,961.32	16,924.70		182,390.57
1945	(22,255.34)	105,978.40	121,540.25		205,263.31
1946	92,332.45	190,747.28	70,077.37		353,157.10
1947	130,680.23	184,354.68	46,618.30	(52,882.74)	308,770.47
1948	152,378.19	119,051.14	24,657.72	(18,305.49)	277,781.56
1949	204,774.09	74,625.76	6,338.52	4,944.42	290.682.79
1950	222,960.70	77,237.48	3,914.30	13,657.12	317,769.60
1951	495,611.18	222,401.15	32,393.09	36,462.96	786,868.38
Totals	$1,882,498.23	$1,158,454.03	$322,464.25	($16,123.73)	$3,347,292.78

We trust the above is the information desired.

Yours very truly,

MAX J. KUNEY COMPANY

Max Kuney, Jr.

MK:ms

Encls. Copy of Trust Agreement
Donors Returns (copy)

EXHIBIT 28

MAX J. KUNEY COMPANY AND OPERATING DIVISIONS
KUNEY JOHNSON COMPANY - AGUTTER ELECTRIC COMPANY
TECLER ALUMINUM PRODUCTS
BALANCE SHEETS AS OF DECEMBER 31, 1951

COPY

	MKJ Co.	K-J Co.	Agutter	Tecler	Consolidated
ASSETS					
Cash	265,949.71	3,381.88	34,943.69	1,025.00	305,300.28
Contract Accounts Receivable	582,194.01	384,771.43	98,453.94	22,108.40	1,087,527.78
Commercial Accounts Receivable	242,667.80	51,835.31	22,429.94	117,664.16	434,597.21
Unbilled Work Accounts Receivable	368.28	10,110.28	830.54	3,421.51	14,730.61
Inventories			92,578.18	104,942.12	197,520.30
Prepaid Items	10,689.64	12,096.50			22,786.14
United States Bonds	11,250.00				11,250.00
Total Liquid Assets	1,113,119.44	462,195.40	249,236.29	249,161.19	2,073,712.32
Notes Receivable	65,787.46			2,100.00	67,887.46
Equipment: Book Value	288,159.80	72,452.77	24,961.04	13,829.62	399,403.23
Land & Buildings: Book Value	13,343.86	85,980.61			99,324.47
Total External Assets	1,480,410.56	620,628.78	274,197.33	265,090.81	2,640,327.48
Internal Accts. Rec.					
Kuney Johnson Co.	107,064.35				107,064.35
Agutter Electric Co.	203,757.00				203,757.00
Tecler Aluminum Products	190,626.27	18,231.48			208,857.75
Total Assets	1,981,858.18	638,860.26	274,197.33	265,090.81	3,160,006.58
LIABILITIES AND NET WORTH					
Bank Drafts Outstanding	139,260.13	163,041.43	36,760.81	29,150.56	368,212.93
Accounts Payable					
Commercial	131,642.75	18,485.11		22,509.68	172,637.54
Subcontractors	139,287.00	60,775.31	11,962.88	4,572.82	216,598.01
P/R & Bus. Taxes	18,690.23	5,246.39			23,936.62
Income Taxes	446,527.44	65,593.48	635.20		512,756.12
Total External Liabilities	875,407.55	313,141.72	49,358.89	56,233.06	1,294,141.22
Internal Accts. Pay.					
Kuney Johnson Co.		107,064.35		18,231.48	125,295.83
Agutter Electric Co.			203,757.00		203,757,00
Tecler Aluminum Products				190,626.27	190,626.27
Total Liabilities	875,407.55	420,206.07	253,115.89	265,090.81	1,813,820.32
Capital After 1951 Taxes					
Max J. Kuney	607,815.16				607,815.16
Max Kuney, Jr.	498,635.47				498,635.47
Lloyd W. Johnson		218,654.19			218,654.19
C. S. Greene			21,081.44		21,081.44
Total Net Worth	1,106,450.63	218,654.19	21,081.44		1,346,186.26
Total Liabilities And Net Worth	1,981,858.18	638,860.26	274,197.33	265,090.81	3,160,006.58

EXHIBIT 30

MAX J. KUNEY COMPANY
CONTRACTORS
EXECUTIVE OFFICE NORTH 120 RALPH
SPOKANE, WASHINGTON

MEMBER
ASSOCIATED GENERAL CONTRACTORS
OF AMERICA

December 31, 1952

GENERAL STATEMENT

TRADE STYLE: Max J. Kuney Company is a partnership with operating divisions for four types of construction work. For trade reasons these divisions are operated under different names as follows:

H	Max J. Kuney Company 120 North Ralph St., Spokane	Heavy Construction Division
B	Kuney Johnson Company 235 Ninth Ave. No., Seattle	Building Division
E	Agutter Electric Company 5500 14th Ave. N. W., Seattle	Electrical Division
M	Tecler Aluminum Products 625 Yale Ave. No., Seattle	Manufacturing Division

HISTORY: The business was founded to do highway and heavy construction work in 1930 by Max J. Kuney. In 1940 his son, Max Kuney, Jr., became a general partner and they then started doing building and electrical work in a small way. In 1941 they started a separate Building Division and in 1944 they started a separate Electrical Division. In 1946 they started the Manufacturing Division.

THE PARTNERS: Max J. Kuney, age 58, and Max J. Kuney, Jr., age 34, are equal partners and general partners in all divisions. Lloyd W. Johnson, age 42, is a special partner, having 50% interest with the Kuneys in the Building and Manufacturing Divisions, and C. S.

Greene, age 44, is a special partner having 50% interest with the Kuneys in the Electrical Division. From earnings partially retained in the business the Kuneys have $1,255,039.44, Lloyd W. Johnson has $210,073.35 and C. S. Greene $51,158.38, invested in the business. None of the partners' personal assets held outside the business are included above. All the partners are active and work full time in the business. Max Kuney, Jr., manages the Heavy Construction Division in Spokane and Max J. Kuney with special partners Johnson and Greene, manages the three other divisions in Seattle.

RESOURCES: The partners' capital after payment of 1952 income taxes is $1,516,271.17. Liquid Assets are 1.4 times Total Liabilities. Net Liquid Assets total $646,433.70. Fixed Assets, except $91,873.47 in notes, are all in equipment, land and buildings used directly in the business with a book value of $777,964.06 after deduction of $839,651.95 depreciation reserves.

PLANT AND EQUIPMENT: The Heavy Construction Division occupies a square block which the firm owns in Spokane. The property consists of office, shop and store buildings and a railroad spur with loading dock with all remaining area paved. The firm also owns three-quarters of the block bounded by Yale, Mercer, Pontius and Roy in Seattle where the Manufacturing Division has had its plant since 1948. In 1952 the size of the Manufacturing Plant was doubled and construction was started on the balance of the property to provide office and warehouse space for the Building Division with surplus space available for rental to tenants. Pending completion of these additions, the Building Division continues as a tenant in the quarters at 235 Ninth Avenue North, which were sold to a private investor in 1952. One half block cornering on Fourteenth Avenue and Market Street in Seattle containing a modern two story office, shop and warehouse building plus fenced and paved open storage area was purchased in 1952 to provide new headquarters for the Electrical Division. The firm owns 238 pieces of major equipment having an original cost of $1,331,407.12, which it uses in its business of heavy grading and excavating, rock crushing, paving, general building and electrical contracting and light manufacturing.

EXHIBIT 30

MAX J. KUNEY COMPANY
CONSOLIDATED BALANCE SHEET AS OF
DECEMBER 31, 1952

ASSETS

Cash in Banks and In Transit to Banks—Schedule "A"		151,031.99
Contract Accounts Receivable, Current—Schedule "B"	560,867.71	
Contract Accounts Receivable, Retainage—Schedule "B"	488,611.47	1,049,479.18
Commercial Accounts Receivable—Schedule "C"		572,473.07
Unbilled Work Accounts Receivable—Schedule "D"		61,091.53
Inventories—Schedule "E"		344,116.21
Prepaid Items—Schedule "F"		18,182.98
United States Bonds at Cost		11,250.00
Total Liquid Assets		2,207,624.96
Notes Receivable—Schedule "G"		91,873.41
Machinery and Equipment—Schedule "H"		
Purchase Price of Equipment Owned	1,331,407.12	
Less Depreciation Reserved	819,653.22	511,753.90
Land and Buildings Held for Business Use—Schedule "I"		
Purchase Price of Land and Buildings Owned	286,208.89	
Less Depreciation Reserved	19,998.73	266,210.16
Total Assets		3,077,462.43

LIABILITIES, RESERVES AND NET WORTH

Bank Drafts Outstanding	383,801.94	
Accounts Payable, Commercial	43,452.32	
Accounts Payable, Payroll and Business Taxes	43,918.17	
Accounts Payable, 1952 Income Taxes	351,032.68	822,205.11
Accounts Payable, Subcontractors, Retainage		334,094.70
Notes Payable, S & E Division, Seattle-1stNational Bank		200,000.00
RESERVE: Capital of Special Partners		
W. R. Wiginton—Superintendent Heavy Const. Div.	86,605.69	
S. O. Claggett—Superintendent Spokane Bldg. Div.	24,068.95	
W. B. Petersen—Manager, Spokane Office	7,875.15	
Erickson & Munson—Joint Venturers Electrical Div.	58,467.25	
W. H. Page—Manufacturing Division	14,750.90	191,767.94
RESERVE: Deferred Income		13,123.51
TOTAL LIABILITIES AND RESERVES		1,561,191.26
GENERAL PARTNERS' NET WORTH AFTER 1952 INCOME TAXES		1,516,271.17
TOTAL LIABILITIES, RESERVES AND NET WORTH		3,077,462.43
CONTINGENT LIABILITIES		NONE

EXHIBIT 30

MAX J. KUNEY COMPANY AND OPERATING DIVISIONS KUNEY JOHNSON COMPANY, AGUTTER ELECTRIC COMPANY, TECLER ALUMINUM PRODUCTS

BALANCE SHEET AS OF DECEMBER 31, 1952

	MJK CO.	K-J CO.	Agutter	Tecler	Consolidated
		ASSETS			
Cash in Banks and in Transit	21,031.46	103,353.36	16,802.05	9,845.12	151,031.99
Contract Accounts Receivable	546,225.95	190,558.73	312,694.50		1,049,479.18
Commercial Accounts Receivable	299,210.25	46,314.48	12,767.31	214,181.03	572,473.07
Unbilled Work Accounts Receivable			13,965.90	47,125.63	61,091.53
Inventories			187,732.01	156,384.20	344,116.21
Prepaid Items	15,367.13	2,051.00	764.85		18,182.98
United States Bonds	11,250.00				11,250.00
Total Liquid Assets	893,084.79	342,277.57	544,726.62	427,535.98	2,207,624.96
Notes Receivable	74,395.42		15,377.99	2,100.00	91,873.41
Equipment: Book Value	367,044.73	82,525.02	45,529.99	16,654.16	511,753.90
Land and Buildings: Book Value:	12,836.94	197,725.66	55,647.56		266,210.16
Total External Assets	1,347,361.88	622,528.25	661,282.16	446,290.14	3,077,462.43
Internal Accts. Rec.					
Kuney Johnson Co.	61,929.65				61,929.65
Agutter Electric Co.	487,250.48				487,250.48
Tecler Aluminum Products	403,522.86				403,522.86
Total Assets	2,300,064.87	622,528.25	661,282.16	446,290.14	4,030,165.42
		LIABILITIES, RESERVES AND NET WORTH			
Bank Drafts Outstanding	120,294.77	225,271.42	16,656.43	21,579.32	383,801.94
Accounts Payable					
Commercial	23,025.27		19,976.44	450.61	43,452.32
P/R & Bus. Taxes	5,439.74	32,491.98		5,986.45	43,918.17
Income Taxes	308,266.81	14,992.69	27,773.18		351,032.68
Subcontractors	256,325.54	77,769.16			334,094.70
Notes Payable S & E	200,000.00				200,000.00
Reserves:					
Capital Special Partners	118,549.79		58,467.25	14,750.90	191,767.94
Deferred Income	13,123.51				13,123.51
Total External Liab. & Res.	1,045,025.43	350,525.25	122,873.30	42,767.28	1,561,191.26
Internal Accts. Pay.		61,929.65	487,250.48	403,522.86	952,702.99
Total Liab. and Reserves	1,045,025.43	412,454.90	610,123.78	446,290.14	2,513,894.25
Capital After 1952 Taxes					
Max J. Kuney & Trust	688,819.71				688,819.71
Max Kuney, Jr. & Trust	566,219.73				566,219.73
Lloyd W. Johnson & Trust		210,073.35			210,073.35
C. S. Greene			51,158.38		51,158.38
Total Net Worth	1,255,039.44	210,073.35	51,158.38		1,516,271.17
Total Liab., Res. and Net Worth	2,300,064.87	622,528.25	661,282.16	446,290.14	4,030,165.42

EXHIBIT 31

MAX J. KUNEY COMPANY

CONTRACTORS

EXECUTIVE OFFICE NORTH 120 RALPH

SPOKANE, WASHINGTON

MEMBER
ASSOCIATED GENERAL CONTRACTORS
OF AMERICA

December 31, 1953

GENERAL STATEMENT

TRADE STYLE: Max J. Kuney Company is a partnership holding all the stock of Max J. Kuney Company, Inc., a Washington Corporation. The corporation has operating divisions for four types of construction work, which it operates with partners. For trade reasons these divisions are operated under different names as follows:

H	Max J. Kuney Company, Inc. 120 North Ralph St., Spokane	Heavy Construction Division
B	Kuney Johnson Company 1266 Mercer Street, Seattle	Building Division
E	Agutter Electric Company 5500 14th Ave. N. W., Seattle	Electrical Division
M	Tecler Aluminum Products 625 Yale Ave. No., Seattle	Manufacturing Division

HISTORY: Max J. Kuney, age 59, founded the business in 1930 to do highway and heavy construction work. Max J. Kuney, Jr., age 35, became a general partner in 1940 and they then started doing building and electrical work in a small way. In 1941 they started a separate Building Division, in 1944 they started a separate Electrical Division and in 1946 they started the Manufacturing Division. In 1953 they incorporated the Heavy Construction Division of which Max J. Kuney is President, Max Kuney, Jr., is Vice-President and W. B. Petersen is Secretary.

PARTNERS: S. O. Claggett, age 45, is a partner in the Heavy Construction Division, Lloyd W. Johnson, age 43, is a partner in the Building and Manufacturing Divisions and C. S. Greene, age 45, is a partner in the Electrical Division. All the partners are active and work full time in the business. Max Kuney, Jr. with partner S. O. Claggett manages the Heavy Construction Division in Spokane and Max J. Kuney with partners Johnson and Greene manages the three other divisions in Seattle.

RESOURCES: From earnings partially retained in the business the Kuneys' have $1,371,188.29, and the other partners have $294,-529.36 invested in the business, totaling $1,665,717.65 after provision for 1953 income taxes. None of the partners' personal assets held outside the business are included above. Liquid assets are 1.35 times Total Liabilities. Net Liquid Assets total $804,384.32. Fixed Assets, except $112,466.24 in notes, are all in equipment, land and buildings used directly in the business with a book value of $748,867.09 after deduction of $1,021,519.88 depreciation reserves.

PLANT AND EQUIPMENT: The Heavy Construction Division occupies a square block which the firm owns in Spokane. The property consists of office, shop, and storage buildings and a railroad spur with loading dock with all remaining area paved. The building and manufacturing divisions occupy three-quarters of the block bounded by Yale, Mercer, Pontius and Roy Streets which the firm owns in Seattle. The land area is 48,109 square feet. The present buildings occupy 37,587 square feet of ground area and contain 46,702 square feet of use area. The remaining 10,522 square feet of ground is paved parking and storage area. The Electrical Division occupies one-half block cornering on 14th Avenue and Market Street which the firm owns in Seattle. It contains a modern two-story office, shop and warehouse building plus fenced and paved open storage area. The firm owns 265 pieces of major equipment having an original cost of $1,394,182.14, which it uses in its business of heavy grading and excavating, rock crushing, paving, general building, electrical contracting and light manufacturing.

EXHIBIT 31

MAX J. KUNEY COMPANY
CONSOLIDATED BALANCE SHEET AS OF
DECEMBER 31, 1953

ASSETS

Cash in Banks and in Transit to Banks—Schedule "A"		78,316.69
Contract Accounts Receivable, Current—Schedule "B"	620,455.22	
Contract Accounts Receivable, Retainage—Schedule "B"	785,279.83	1,405,735.05
Commercial Accounts Receivable—Schedule "C"		870,560.75
Unbilled Work Accounts Receivable—Schedule "D"		92,451.35
Inventories—Schedule "E"		668,383.68
Prepaid Items—Schedule "F"		7,298.51
Total Liquid Assets		3,122,746.03
Notes Receivable—Schedule "G"		112,466.24
Machinery and Equipment—Schedule "H"		
Purchase Price of Equipment Owned	1,394,182.14	
Less Depreciation Reserved	987,530.12	406,652.02
Land and Buildings Held for Business Use—Schedule "I"		
Purchase Price of Land and Buildings Owned	376,204.83	
Less Depreciation Reserved	33,989.76	342,215.07
Total Assets		3,984,079.36

LIABILITIES, RESERVES, CAPITAL AND SURPLUS

Bank Drafts Outstanding	335,319.74	
Accounts Payable, Commercial	112,296.06	
Accounts Payable, Payroll and Business Taxes	41,706.81	
Accounts Payable, 1953 Income Taxes	114,367.64	603,690.25
Accounts Payable, Subcontractors		405,308.68
Notes Payable, S & E Division, Seattle-1st National Bank		1,104,723.86
RESERVE: Capital of Special Partners		
W. R. Wiginton—Superintendent Heavy Const. Div.	107,220.43	
W. B. Petersen—Manager, Spokane Office	13,818.54	
W. H. Page—Manager, Manufacturing Division	13,000.00	134,038.97
RESERVE: Deferred Income		70,599.95
TOTAL LIABILITIES AND RESERVES		2,318,361.71
CAPITAL AND EARNED SURPLUS AFTER 1953 INCOME TAXES		1,665,717.65
TOTAL LIABILITIES, RESERVES, CAPITAL AND SURPLUS		3,984,079.36
CONTINGENT LIABILITIES		NONE

EXHIBIT 32

MAX J. KUNEY COMPANY

CONTRACTORS

EXECUTIVE OFFICE NORTH 120 RALPH
SPOKANE, WASHINGTON

MEMBER
ASSOCIATED GENERAL CONTRACTORS
OF AMERICA

December 31, 1954

GENERAL STATEMENT

TRADE STYLE: Max J. Kuney Company is a partnership holding all the stock of Max J. Kuney Company, Inc., a Washington Corporation. The corporation has operating divisions for three types of construction work, which it operates with partners. For trade reasons these divisions are operated under different names as follows:

H	Max J. Kuney Company, Inc. 120 North Ralph St., Spokane	Heavy Construction Division
B	Kuney Johnson Company 1266 Mercer St., Seattle	Building Division
E	Agutter Electric Company 5500 14th Ave. N. W., Seattle	Electrical Division

HISTORY: Max J. Kuney, age 60, founded the business in 1930 to do highway and heavy construction work. Max Kuney, Jr., age 36, became a general partner in 1940 and they then started doing building and electrical work in a small way. In 1941 they started a separate Building Division, in 1944 they started a separate Electrical Division and in 1946 they started the Manufacturing Division, known as Tecler Aluminum Products, which operated as a subsidiary of the Building Division. In 1953 they incorporated the Heavy Construction Division of which Max J. Kuney is President, Max Kuney, Jr., is Vice-President and W. B. Petersen is Secretary.

In 1954 the Manufacturing Division, Tecler Aluminum Products, was completely liquidated at a loss of $544,845.66 and in addition a

write-off of $71,325.77 was taken on Agutter Electric Company assets, mainly obsolete inventory. The present statement reflects these losses totaling $616,171.43 and tax refunds of $177,733.48 now claimed by the partners on Federal Income Taxes paid, but it does not reflect interest on these tax funds or any future benefit because of the operating loss carry forward of $79,864.88 which is applicable only to partner Lloyd W. Johnson. 1954 profits from remaining operations of the firm reduce its net worth decrease on the present statement, as compared with its statement of December 31, 1953, to $221,248.58 after provision for 1954 Federal Income Taxes.

PARTNERS: S. O. Claggett, age 46, is a partner in the Heavy Construction Division, Lloyd W. Johnson, age 44, is a partner in the Building Division and C. S. Greene, age 46, is a partner in the Electrical Division. All the partners are active and work full time in the business. Max Kuney, Jr., with partner S. O. Claggett manages the Heavy Construction Division in Spokane and Max J. Kuney with partners Johnson and Greene manages the two other divisions in Seattle.

RESOURCES: From earnings partially retained in the business the Kuneys' have $1,396,409.29, and the other partners have $48,059.78 invested in the business, totaling $1,444,469.07 after provision for the 1954 income taxes. None of the partners' personal assets held outside the business are included above. Liquid Assets are 2.32 times Current Liabilities. Net Liquid Assets total $620,714.08. Fixed Assets, except $164,822.80 due from Federal Income Tax refunds on amended returns of prior years awaiting audit, $52,187.09 in notes and the $187,317.00 book value of rental property in San Francisco held for investment are all in equipment, land and buildings used directly in the business with a book value of $526,588.10 after deduction of $1,080,319.11 depreciation reserves.

EXHIBIT 32

MAX J. KUNEY COMPANY
CONSOLIDATED BALANCE SHEET AS OF
DECEMBER 31, 1954

ASSETS

Cash in Banks and in Transit To Banks—Schedule "A"		310,807.79
Contract Accounts Receivable, Current—Schedule "B"	225,220.45	
Contract Accounts Receivable, Retainage—Schedule "B"	86,974.61	312,195.06
Commercial Accounts Receivable—Schedule "C"		302,183.55
Notes Receivable, Current Portion—Schedule "D"		104,384.28
Inventories—Schedule "E"		45,796.60
Current Income Tax Refunds Due—Schedule "F"		12,910.68
Prepaid Items—Schedule "G"		1,655.50
Total Liquid Assets		1,089,933.46
Income Tax Refund Claims Filed—Schedule "H"		164,822.80
Notes Receivable, Due after One Year—Schedule "D"		52,187.09
Machinery and Equipment—Schedule "I"		
Purchase Price of Equipment Owned	1,230,702.38	
Less Depreciation Reserved	1,028,622.00	202,080.38
Land and Buildings Held for Business Use—Schedule "J"		
Purchase Price of Land and Buildings Owned	376,204.83	
Less Depreciation Reserved	51,697.11	324,507.72
Land and Buildings Held for Investment—Schedule "K"		
Purchase Price—225 Shaw Road, San Francisco	192,500.00	
Less Depreciation Reserved	5,183.00	187,317.00
Total Assets		2,020,848.45

LIABILITIES, CAPITAL AND SURPLUS

Bank Drafts Outstanding	109,622.68	
Accounts Payable, Commercial	20,112.73	
Accounts Payable, Payroll and Business Taxes	23,878.43	153,613.84
Accounts Payable, Subcontractors		113,511.87
Provision for 1954 Income Taxes		
Due April, July and October 1955		92,152.19
Notes Payable (San Francisco Property), Current Portion		4,560.00
RESERVE: Capital of Special Partners		
W. R. Wiginton—Superintendent Heavy Const. Div.	91,340.29	
W. B. Petersen—Manager, Spokane Office	14,041.19	105,381.48
TOTAL CURRENT LIABILITIES		469,219.38
Notes Payable (Mortgage on Property at 225 Shaw Road,		
San Francisco)—Portion Due After One Year		107,160.00
Total Liabilities		576,379.38
CAPITAL AND EARNED SURPLUS		
AFTER PROVISION FOR INCOME TAX		1,444,469.07
TOTAL LIABILITIES, CAPITAL AND SURPLUS		2,020,848.45
CONTINGENT LIABILITIES		NONE

EXHIBIT 33

RENTAL AGREEMENT

This AGREEMENT, made and entered into this 14th day of May, 1953, by and between MAX J. KUNEY COMPANY, a partnership, hereinafter referred to as "Partnership", and MAX J. KUNEY COMPANY, a corporation, hereinafter referred to as "Corporation",

WITNESSETH:

Whereas the Partnership owns certain land, buildings, equipment and machinery and is willing to rent part or all of such property to the corporation, and

Whereas the corporation is engaged in the general contracting business and desires to rent from time to time certain of the property owned by the Partnership, and

Whereas the parties hereto desire to enter into an agreement in writing defining their respective rights and obligations with respect to the rental of said property,

Now, therefore, in consideration of the foregoing recitations, and the mutual promises and covenants of the parties hereto, it is agreed as follows:

(1) The terms of this agreement shall apply to all property, real and personal, which may be rented by the Partnership to the Corporation at any time from June 1, 1953 until otherwise terminated by the parties hereto.

(2) The rates of rental on machinery and equipment shall be a designated percentage, to be agreed upon between the parties, of the rates on similar machinery and equipment established by the current A.E.D. Manual. Where no rate is established in said manual as to a particular type of machinery or equipment, then the rental shall be as agreed upon between the parties. Rentals shall be charged only for the period in which the property is in actual use.

(3) The amount of rental to be charged for land and buildings shall be as agreed upon between the parties.

(4) All property, real and personal, covered by this agreement shall be upon a "bare rental basis", which is herein defined to mean that the corporation shall be responsible for the payment of all costs, repairs and other expenses of whatever kind or nature, including taxes, insurance, and assessments against said rental property during the

period in which the property is rented to the corporation under this agreement. All property shall be returned to the Partnership in the same condition as when received by the Corporation, ordinary wear and tear not excepted hereunder. The risk and liability for any injury or damage to said property from any source or cause whatever until the property is returned to the Partnership, shall be born by the Corporation, and the amount of such damages shall be paid to the Partnership by the Corporation upon demand.

(5) The real property covered by this agreement is represented to be in good condition, and, the personal property covered hereunder is represented to be in proper running order, but it is expressly understood that the Partnership is in no way responsible for the engineering in connection with its use or any other factor affecting the results to be accomplished by said property.

(6) In the event the Corporation fails to perform any of the terms of this agreement the Partnership may, at its option, cancel this agreement and immediately retake possession of the rented property, in which event the Corporation agrees to pay all costs in connection with the repossession of said property. If the Partnership decides to bring action of any kind to enforce any of the terms of this agreement, the Corporation agrees to pay in addition to the costs and disbursements provided by law, a reasonable attorney's fee, to be fixed by the court in which such action is brought.

(7) Time in the performance of each and every term and condition of this agreement are of the essence hereof. Nothing contained in this Rental Agreement shall be construed as an agreement of purchase.

(8) The terms of this agreement shall bind the heirs, administrators, assigns and successors in interest of each of the parties hereto.

IN WITNESS THEREOF, the parties have set their hands and seals the day above written.

MAX J. KUNEY COMPANY,
Partnership
By MAX KUNEY,
Partner
MAX J. KUNEY COMPANY,
Corporation
By MAX J. KUNEY,
President

EXHIBIT 34

CERTIFICATE OF TRUE NAME

KNOW ALL MEN BY THESE PRESENTS, That the undersigned, doing business at Spokane, in the County of Spokane, and State of Washington, under an assumed name and style, do hereby certify that the designation, name and style in which said business is to be conducted is: MAX J. KUNEY CO., and do further certify that the following persons are all of the persons conducting or intending to conduct said business or having an interest therein, and their true and real names, together with their respective post office addresses, are as follows:

Name	Post Office Address
Max J. Kuney	North 120 Ralph St.
Max Kuney, Jr.	Spokane 15, Washington

IN WITNESS WHEREOF, I have hereunto set my hand this 2nd day of July, A.D. 1945.

MAX J. KUNEY CO.
By W. B. PETERSEN
Office Manager

STATE OF WASHINGTON }
County of Spokane } ss.

I, NELS PAULSEN, Notary Public in and for the State of Washington, residing at Spokane, do hereby certify that on the 2nd day of July, 1945, personally appeared before me, W. B. Petersen, to me known to be the individual described in and who executed the within certificate of true name and acknowledged that he signed and sealed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

GIVEN UNDER MY HAND and official seal this 2nd day of July, 1945.

NELS PAULSEN
Notary Public in and for the State of Washington, residing at Spokane.

EXHIBIT 35

Certificate Of Firm Name

KNOW ALL MEN BY THESE PRESENTS, That the undersigned MAX J. KUNEY and MAX J. KUNEY, Jr., doing business at Spokane in the County of Spokane and State of Washington under an assumed name and style do hereby certify that the designation, name and style in which said business is to be conducted is MAX J. KUNEY COMPANY, that the following named persons are all of the persons conducting or intending to conduct said business or having an interest therein, and their true and real names, together with their respective post office addresses, are as follows, to-wit:

MAX J. KUNEY, 235 9th No., Seattle, Wash.

MAX J. KUNEY, Jr., North 120 Ralph St., Spokane, Wash.

IN WITNESS WHEREOF, we have hereunto set our hands this 27th day of March, A.D. 1953.

FILED APRIL 16, 1953
GEO. E. FALLQUIST, Clerk
SPOKANE COUNTY

MAX J. KUNEY
MAX J. KUNEY, Jr.

STATE OF WASHINGTON }
County of King } ss.

I, William J. McAllister, Notary Public in and for the State of Washington, residing at Seattle, do hereby certify that on this 27th day of March, 1953, personally appeared before me, Max J. Kuney and Max J. Kuney, Jr., to me known to be the individuals described in and who executed the within instrument and acknowledge that they signed and sealed the same as their free and voluntary act and deed for the uses and purposes herein mentioned.

GIVEN UNDER MY HAND AND OFFICIAL SEAL this 27th day of March, 1953.

WILLIAM J. McALLISTER
Notary Public in and for the
State of Washington, residing
at Seattle.

EXHIBIT A

	2. Percentage of Time Devoted to Business	3. Ordinary Income (or loss) (line 33, page 1)
Max J. Kuney	All	$14,686.19
Max Kuney, Jr.	All	14,686.19

EXHIBIT G

February 7, 1957

Effective Dates As Shown

PARTNERSHIP AGREEMENT: The Partners of Kuney Family Partnership agree that effective January 1, 1955, and until this agreement is changed in writing: (1) Active Partners Max J. Kuney and Max Kuney, Jr., shall receive total compensation $10,000 per year from Partnership income to be divided equally between them and that the remaining income shall be distributed in proportion to each partner's Capital Investment in the Partnership. (2) Active Partners compensation each year shall be taken entirely from Partnership Capital Gains if such are sufficient, with the balance to be taken from Partnership Ordinary Income only when such is sufficient and Capital Gains are not sufficient.

MJK

Distribute Kuney Family Partnership Income FYE 12-31-55, according to CORPORATION MINUTES recorded JV 1, in proportion to Capital Interest recorded JV 3, and in accordance with PARTNERSHIP AGREEMENT recorded JV 4.

December 31, 1955:

	Ordinary Income	Capital Gains	Ledger Debits	Entry Credits
DR 2931 Loss & Gain				
Kuney Partnership 1955	.00	18,672.50	18,672.50	
Deduct for Active Partner's Services		10,000.00		
Distribute Remainder In Proportion				
to Capital January 1, 1955	.00	8,672.50		
CR 2861 Capital Max J. Kuney				
Capital Gains	16.99%	1,473.46		
Capital Gains Compensation		5,000.00		6,473.46
CR 2862 Capital Max Kuney, Jr.				
Capital Gains	16.99%	1,473.46		
Capital Gains Compensation		5,000.00		6,473.46
CR 2833 Capital Trust John R. Kuney				
Capital Gains	33.66%			2,919.16
CR 2834 Capital Trust Max J. Kuney III				
Capital Gains	16.18%			1,403.21
CR 2835 Capital Trust Caroline I. Kuney				
Capital Gains	16.18%			1,403.21

MJK

Compute Income Tax Payable 1955 Amended Returns:

TAXPAYER	Ordinary Income	Deductions Exemptions	Taxable Income	Capital Gains	Tax Total
Max J. Kuney	17,854.34	13,972.44	3,881.90	6,473.46	1,695.59
Max Jr. & Constance K. Kuney	17,890.47*	3,400.00	14,490.47	6,473.46	4,507.25
Trust: John R. Kuney	5,657.94	100.00	5,557.94	2,919.16	1,665.26
Trust: Max J. Kuney III	1,183.51	100.00	1,083.51	539.12	270.61
Trust: Caroline I. Kuney	1,183.51	100.00	1,083.51	539.12	270.61
C. H. and Mabel					
Bently (Deceased)	3,071.82	3,935.91	(864.09)	1,728.18	.00
Totals	46,841.59	21,608.35	25,233.24	18,672.50	8,409.32

*Includes $36.13 Interest on Tax Refund

MJK

EXHIBIT Q

MINUTES OF SPECIAL MEETING OF SHAREHOLDERS, DIRECTORS AND OFFICERS OF MAX J. KUNEY COMPANY, INC.

March 20, 1956

On the above date, with all present and with Max J. Kuney presiding, W. R. (Tex) Wiginton was called into this meeting and this was done:

To quickly get to essential facts, I stated to all that the Corporation was owned by the Kuneys, that therefore whenever we said this or that was to be done it would mean it was done by unanimous approval of all shareholders, officers and directors of Max J. Kuney Company. The others said they understood this to be a fact.

I then requested them to imagine a condition widely different than this; with me owning 20%, my son 25%, Tex 40% and Petersen 15%, with the Kuneys out of control and residing permanently in some foreign land and they in control and managing but with the Kuneys still owning all Fixed Assets (Machinery & Equipment, Land & Buildings).

I said I was going to describe an arrangement I had worked out for the Corporation to pay rent to the Kuneys which would not only apply under those conditions, but under present conditions, as well, with the added requirement that the arrangement would be governed by the most thoroughly understood laws of the United States but that no lawyers or courts of law would ever be necessary to interpret them. Furthermore, settlement between Fixed Asset users and owners was to be accomplished annually between user and owner without any more accounting than would be required by law if user and owner was one and the same, and that finally this annual statement be so concise that the entire details would appear on one sheet of paper.

I requested all present to listen carefully and be prepared to take sides against me, and so they did listen.

I then stated that the laws were to be those governing the Federal Income Tax, that its Revenue Agents would take the place of lawyers and courts and I handed them an actual statement between all the

users and the owners that had not required any extra accounting and actually was on one sheet of paper.

The users had paid all ownership costs including interest on investment, and depreciation allowable or to be allowed on owner's Fixed Assets, and had computed this depreciation. The settlement stated this amount and added 30% to it as total net rent, and computed each owner's share of ownership in total Fixed Assets in use.

On inquiry of those present, I explained that the basis of rent was always a function of cost and time, so was depreciation and that therefore there was a precise relationship between the two, and that the 30% added was a simple but accurate determination of fair annual rental under average conditions.

With that understood it was stated that this rule would provide no rent profit on items which were in use after expiration of "ordinary useful life". It was then agreed there was a sound reason why this should be; namely, incentive to the user to carefully maintain equipment so he could get "free rent" after expiration of normal life, with corresponding benefit to owner's reduction in capital outlay. It was also stated that there could never be rent profit on owner's land but that in return the owner might have a "free ride" on capital gains because of appreciation in land values. All present stated they would consider the rule fair regardless of which side of the fence they were on.

It was understood the Corporation's real purpose from the beginning was that Wiginton and Petersen would own shares in the Corporation and that $100,000.00 would buy a 20% interest.

It was agreed they would own shares for as long as they were employed, and that my son and I would take back their shares at their cost, plus 5% interest compounded annually, or at the book value of their shares if this amount was greater, whenever their employment was terminated.

I then stated that more or different shares would be issued to make total Corporation Capital $500,000.00 and this was agreed. Nothing final was decided on actual amount of Wiginton's and Petersen's participation: Both stated they wanted to come in for all the money they could raise. It was agreed they could come in for $100,000.00 total.

All decisions and agreements throughout this meeting were unanimous.

The purpose of this meeting being accomplished, it was ended by common consent.

MAX J. KUNEY
Chairman and President

Attest:
W. B. PETERSEN, Secretary

We, the undersigned, verify we were present together at the above meeting and that the above correctly states what occurred there:

MAX J. KUNEY	W. R. WIGINTON
MAX J. KUNEY, Jr.	W. B. PETERSEN

EXHIBIT Q

MINUTES OF THE ANNUAL MEETING OF THE SHAREHOLDERS OF MAX J. KUNEY COMPANY

Minutes of the annual meeting of the shareholders of Max J. Kuney Company held at the office of the company, North 120 Ralph Street, Spokane, Washington, on the 1st day of May, 1956 at the hour of 10 o'clock A. M. All of the outstanding capital stock of the company being represented in person and notice of the time, place and purpose of the meeting having been unanimously waived the meeting was declared in order for the transaction of business.

Mr. Max J. Kuney was chosen as chairman of the meeting and it was declared that there was a quorum present.

The chairman suggested that consideration must be given to proper arrangements for charges to the corporation for the use of partnership fixed assets as well as interest on other partnership funds used for the benefit of the corporation. In discussion it was pointed out that the examining revenue agent's report was not completed and it would be difficult to establish a lasting policy or make any changes at this time until the position of the treasury department can be determined. After discussion it was agreed that the general policy would be that the corporation should pay interest on capital

accounts of the Kuney Family Partnership and rent on fixed assets at a percentage of actual book depreciation but it was agreed that establishment of the exact rates and procedures would be postponed pending receipt of the examining revenue agent's report.

No motion was received to make any change in the Board of Directors as previously appointed in the annual meeting of May 1, 1954, and therefore said directors continue in office persuant to the action of that meeting.

There being no further business to come before the meeting, it was, on motion, adjourned.

W. B. PETERSEN
Secretary

EXHIBIT Q

MINUTES OF SPECIAL MEETING OF SHAREHOLDERS, DIRECTORS AND OFFICERS OF MAX J. KUNEY COMPANY OF FEBRUARY 7, 1957

On the above day at Spokane, Washington a special meeting of the shareholders, directors and officers of the Max J. Kuney Company was held and there were present the following: Max J. Kuney, Max Kuney, Jr., W. R. Wiginton, W. B. Petersen.

All of the outstanding capital stock of the company being represented in person and notice of the time, place and purpose of the meeting having been unanimously waived the meeting was declared in order for the transaction of business. Mr. Max J. Kuney was chosen chairman of the meeting and discussion was had concerning the Internal Revenue Agent's examination in process. After discussion in detail and thereupon, on motion duly made, seconded and unanimously carried the following resolution was adopted: Resolved that all corporation shareholders accept (and the Kuney Family Partnership also accepts through partners Max J. Kuney and Max Kuney, Jr.'s agreement) the distribution of income fiscal year ending 1954 (corporate 4-30-55) as recorded in January 7, 1957 Taxpayer's Protest Schedule "C".

The next matter of discussion advanced by the chairman was the

desirability of creating another vice president of the corporation. Considerable discussion followed and thereupon, on motion duly made, seconded and unanimously carried, the following resolution was adopted: Resolved that W. R. Wiginton is hereby elected a vice president of the Max J. Kuney Company effective immediately.

The next matter of discussion advanced by the chairman was the desirability of equalizing compensation from the corporation between Max J. Kuney, Max Kuney, Jr. and W. R. Wiginton and establishing a new salary range for Secretary W. B. Petersen. After considerable discussion in detail and thereupon, on motion duly made, seconded and unanimously carried the following resolution was adopted: Resolved that effective January 1, 1955 corporate compensation of Max J. Kuney, Max Kuney, Jr. and W. R. Wiginton shall be equalized at $15,000 per year each and effective January 1, 1957 corporate compensation of W. B. Petersen shall be set at $12,000 per year, and it was further resolved that the directors shall be empowered to grant year end bonuses to the officers of this corporation with the amounts of such bonuses to be determined when final accounting for the year is completed and with the further provision that bonuses for officers are to be determined in reasonable amounts consistent with the duties and responsibilities of the persons involved.

The next item of discussion advanced by the chairman concerned the matter of payment of rental by the corporation to the Kuney Family Partnership for fiscal years 1955 and 1956 and interest on the partner's investment in those fixed assets. It was discussed that the examining Internal Revenue Agent had taken the position that the fixed assets in Seattle were, in effect, transferred to the corporation. It was discussed that this was not a tenable position and the corporation has protested accordingly, however, pending clarification it was discussed that rental charges on fixed assets for years 1955 and 1956 should best be held in abeyance until the treasury's position on this question was better known. Following this detailed discussion, on motion duly made, seconded and unanimously carried the following resolution was adopted: Resolved that for the time being the Kuney Family Partnership shall not charge the corporation rental for the use of its fixed assets fiscal years ending 1955 and 1956 but that following clarification of the Internal Revenue Department's position on the matter of the Seattle assets proper rental may be subsequently charged retroactively and, be it further resolved, that the

corporation shall pay interest on the partner's investment in fixed assets during the years in question at the interest rate the corporation paid the banks for borrowed money during those years.

The chairman next pointed out that the original corporate stock issued in a single certificate in the amount of $400,000 to the Max J. Kuney Company Partnership was incorrectly issued and the stock should have been issued in two separate certificates in amount of 200,000 shares each, one to Max J. Kuney and one to Max Kuney, Jr. Upon discussion and motion duly made, seconded, and unanimously carried the following resolution was adopted: Resolved that the directors of the Max J. Kuney Company are hereby authorized to recall and cancel the original stock certificate issued to the Max J. Kuney Company Partnership and replace this certificate with two separate certificates in the amount of 200,000 shares each, one to Max J. Kuney and one to Max Kuney, Jr.

There being no further business, the meeting adjourned.

W. B. PETERSEN
Secretary

EXHIBIT Q

MINUTES OF A SPECIAL MEETING OF THE DIRECTORS OF MAX J. KUNEY COMPANY

Minutes of a special meeting of the directors of Max J. Kuney Company held at the office of the company, North 120 Ralph Street, Spokane, Washington, on the 6th day of February, 1958 at the hour of 10 o'clock A.M. All of the directors being present and notice of the time, place and purpose of the meeting having been unanimously waived the meeting was declared in order for the transaction of business.

Mr. Max J. Kuney pointed out to the directors that the Internal Revenue Agent's examination had been entirely completed and final conferences held with the appellate staff in Seattle and that all issues involving the corporation have finally been settled substantially the same as the original tax returns were filed. It was pointed out that for the years 1955 and 1956 the matter of rental charges to the cor-

poration on fixed assets owned by the Kuney Family Partnership and interest charges to the corporation on funds and investment in fixed assets owned by the Kuney Family Partnership has not been consistent as it should be. The Treasury Department has now approved in general the policy of the Kuney Family Partnership charging the corporation rent for the use of partnership fixed assets and has also recognized that interest on investments should be paid as has been the policy of the company for many years. Following discussion and in order to effect a consistent policy for all years on motion duly made, seconded, and unanimously carried, the following resolution was adopted: Resolved that in accordance with prior recommendations (see minutes of March 20, 1956) the corporation shall pay rent on fixed assets to the Kuney Family Partnership at a percentage of depreciation and that for the years 1955, 1956 and 1957 this percentage is to be set at 30% of depreciation and be it further resolved that interest on the capital accounts of the Kuney Family Partnership is to be paid by the corporation at the same rate as the corporation pays for bank financing and be it further resolved that a certified public accountant shall be engaged to amend all tax returns as required to reflect these changes in the years 1955 and 1956.

There being no further business, the meeting adjourned.

W. B. PETERSEN
Secretary

EXHIBIT R

MAX J. KUNEY COMPANY

CONTRACTORS

EXECUTIVE OFFICE NORTH 120 RALPH
SPOKANE, WASHINGTON

MEMBER
ASSOCIATED GENERAL CONTRACTORS
OF AMERICA

December 31, 1955

GENERAL STATEMENT

TRADE STYLE: Max J. Kuney Company is a partnership holding all the stock of Max J. Kuney Company, Inc., a Washington Corporation. The corporation has operating divisions for three types of

construction work, which it operates with partners. For trade reasons these divisions are operated under different names as follows:

H	Max J. Kuney Company, Inc. 120 North Ralph St., Spokane	Heavy Construction Division
B	Kuney Johnson Company 1266 Mercer St., Seattle	Building Division
E	Agutter Electric Company 5500 14th Ave. N. W., Seattle	Electrical Division

HISTORY: Max J. Kuney, age 61, founded the business in 1930 to do highway and heavy construction work. Max Kuney, Jr., aged 37, became a general partner in 1940 and they then started doing building and electrical work in a small way. In 1941 they started the Building Division and in 1944 they started the Electrical Division. In 1953 they incorporated the Heavy Construction Division of which Max J. Kuney is President, Max Kuney, Jr. and S. O. Claggett are Vice-Presidents and W. B. Petersen is Secretary-Treasurer.

In 1946 a Manufacturing Division known as Tecler Aluminum Products was started as a subsidiary of the Building Division. This operation was not successful and was completely liquidated in 1954 at a loss of $544,845.66. This loss and concentration on collection of Tecler accounts has resulted in curtailment of construction contract volume in 1954 and 1955 to less than one-half average and normal volume.

PARTNERS: S. O. Claggett, age 47, is a partner in, as well as a non-salaried Vice President of, the Heavy Construction Division; Lloyd W. Johnson, age 45, is a partner in the Building Division and C. S. Greene, age 47, is a partner in the Electrical Division. All the partners are active and work full time in the business. Max Kuney, Jr., with partner S. O. Claggett manages the Heavy Construction Division in Spokane and Max J. Kuney with partners Johnson and Greene manages the two other divisions in Seattle.

RESOURCES: From earning partially retained in the business after paying Tecler losses of $544,845.66 the Kuneys' now have $1,315,495.63 and the other partners have $15,126.25 invested in the business, totaling $1,330,621.88 after provisions for 1955 income taxes. None of the partners' personal assets held outside the business

are included above. Liquid Assets are 1.56 times Current Liabilities. Net Liquid Assets total $373,587.98. Fixed Assets include $153,422.12 due from Federal Income Tax refunds on amended returns of prior years awaiting audit; $123,957.51 in notes secured by deeds of trust on real property and the $180,017.00 book value of rental property in San Francisco held for investment with the balance represented by equipment, land and buildings used directly in the business with a book value of $499,637.27 after deduction of $1,140,345.44 depreciation reserves.

APPENDIX C

The following list of defendant's exhibits was mistakenly omitted from the pre-trial order printed in the record at pages 49-71. All the exhibits were introduced into evidence except Exhibit S, but are referred to only by description in the transcript of testimony reproduced in the printed record.

DEFENDANT'S EXHIBITS

Exhibit

A. U. S. Partnership Returns of Income—
Max J. Kuney Company/Kuney Family Parnership, 1955 to 1959

B. Fiduciary Income Tax Returns—
Years 1955-1958
Trust, Benefit of:
John R. Kuney
Max J. Kuney III
Caroline I. Kuney

C. Individual Income Tax Returns—1955-1958
Max J. Kuney
Max (Jr.) and Constance Kuney

D. Corporation Income Tax Returns, 1954-1959

E. Journal Vouchers—1953

F. Journal Vouchers—GLJV No. 1—May 31, 1953 — Partnership

G. Bible—Max J. Kuney Company

H. Journal Vouchers, No. JV 65, 67, 70 — Dec. 31, 1957

I. Journal Vouchers GLJV 1146, 1147 — Feb. 5, 1957

J. Journal Vouchers, 1958

K. Journal Vouchers, 1959

L. Drafts—Max J. Kuney Co. Bank Account

M. General Ledger—Max J. Kuney Company Partnership

N. General Ledger—Max J. Kuney Company (Corporation)—Manual

O. General Ledger—Max J. Kuney Company (Corporation)—Machine

P. Worksheet—Statement of Assets and Liabilities Transferred to Corporation June 1, 1953

Q. Corporation Minutes and Stock Record—Max J. Kuney Company

R. Financial Statement to Dun and Broadstreet May 1, 1956

S. Financial Statement Eval., Dun & Bradstreet —Dec. 31, 1959